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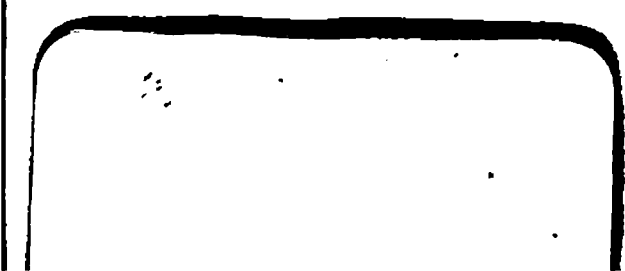
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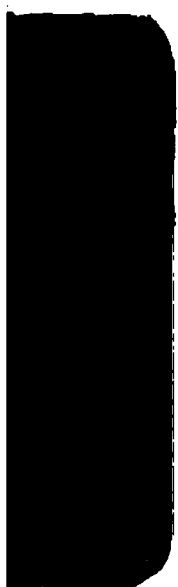
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THE
AMERICAN DECISIONS

CONTAINING ALL THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1800.**

COMPILED AND ANNOTATED BY

JOHN PROFFATT, LL. B.,

Author of "A Treatise on Jury Trial," etc.

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CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

COMMONWEALTH v. ANDREWS.

[2 Mass. 14.]

GOODS STOLEN IN ONE STATE CARRIED TO ANOTHER.—An indictment will lie against the receiver of goods stolen in New Hampshire, and brought into this state.

INDICTMENT for receiving stolen goods. It stated that the defendant “at Boston, aforesaid, in the county of Suffolk, aforesaid on the second day of July, did abet and maintain him, the said Tuttle [the principal], in committing and perpetrating the said felony and theft, and there, after the said goods and chattels were stolen, as aforesaid, knowingly did receive all the same goods and chattels of him, the said Tuttle, knowing the same to have been stolen, taken and carried away, as aforesaid, against the peace,” etc. It appeared that Tuttle stole the goods in New Hampshire, and immediately brought them into the state of Massachusetts, and there concealed them in a wood. He was pursued and carried back to New Hampshire, and there committed to prison. One Symonds obtained information from Tuttle regarding the concealment of the goods, Tuttle believing him an accomplice, though in reality he was an agent of an association for the detection of robberies, etc. The goods were found and carried to Harvard, in the county of Worcester, with Tuttle’s consent. Symonds, in the meantime, for a sum of money less than the value of the goods, procured from Dow, the owner, a bill of sale, or a release of his interest in them, without disclosing to him that he had them in possession, and with the sole view, as he testified, of procuring the conviction of Andrews, whom he and his associates believed to be a receiver of stolen goods. Tuttle, having procured bail,

took the goods in company with Symonds to Boston, and there sold them to Andrews, and under circumstances showing the latter knew the property to be stolen. The defendant was convicted, and a motion was made for a new trial, on the ground of the verdict being against evidence.

Parsons and Otis, for defendant, cited *Butler's case*, 3 Inst. 113, where the court refused to take cognizance of the offense, which was stealing goods at sea, and bringing them into the county, because the original taking was not a felony committed within the jurisdiction of the court. They also cited 1 Hawk. P. O. 217, c. 33, s. 53.

Davis, solicitor-general, and Sullivan, attorney-general, on behalf of the commonwealth, relied on *Commonwealth v. Cullen*, 1 Mass. 116; and argued that a person stealing goods in one state and bringing them into another, may be indicted in the latter, for every moment's continuance of the trespass is as much a wrong, and may come under the word *cepit* as the first taking: 1 Hawk. P. O. 217, c. 33, s. 52.

PARKER, J. I hold myself bound by the authority of *Cullen's case*, and that of *Paul Lord*, unless I were convinced that those decisions were against law. If solemn and repeated determinations of this court are to be disregarded, I know not how we are to govern ourselves. But upon principle, independently of these cases, it appears to me that the common law doctrine respecting counties may well be extended, by analogy, to the case of states, united, as these are, under one general government. In this case, however, I see nothing to induce the court to say that the second taking by Tuttle at Harvard was not felonious. The point on which the court refused cognizance of the pirates' case, mentioned in 3 Inst., was that the admiralty having jurisdiction of the offense, there was no danger that the criminals would escape unpunished. In the case at bar, on the contrary, if the defendant is discharged from this indictment he can be convicted nowhere. All that can be inferred from the statute of 13 G. III is, that there were doubts, or different opinions, on the question. If there had been a decision against the jurisdiction, it would not have been said that doubts existed; but that the law needed alteration. Different opinions may have been held also in this country, but the two cases which have been cited (and several others of like kind are in the recollection of some of the court) ought to settle the point. I am satisfied with the verdict, and against granting a new trial.

THATCHER, J. I concur in my brother's opinion, and for the same reasons. It appears to me that these goods were taken by Tuttle *animo furandi*, at Harvard, and that it is immaterial how they came there; that Tuttle brought them, thus stolen, to Boston, where the present defendant received them, knowing, beyond all doubt, that they had been stolen. We have, then, under the impression that the facts make on my mind, no occasion to call the cases of Lord and Cullen to support this verdict. I am against a new trial.

SEDGWICK, J. In this case the defendant is convicted on an indictment charging him with receiving the goods enumerated in it, which were stolen by Amos Tuttle from Moses Dow, jr., knowing them to have been so stolen. On the trial, it appeared by the evidence that the goods were stolen by Tuttle in the state of New Hampshire, by him brought into this state, at first concealed, afterwards deposited with an innocent person in this state, again received by Tuttle, and by him finally delivered to the defendant, who, at the time he received the goods, was acquainted with all these circumstances. The defendant has been convicted on satisfactory evidence; but it is said by his counsel "that as the original theft was committed in another independent state, the principal offender, Tuttle, could not be convicted here, although he brought the goods into this county; that the goods have, in fact, never been stolen here; and that, therefore, the defendant ought not to be punished as a receiver of stolen goods." And it is undoubtedly true that although by our statute, the conviction of the principal thief is not necessary to the conviction of the receiver, yet, unless there has been a theft within the state there can be no receiver of the stolen goods, and the defendant ought not to have been convicted.

At the trial, I inclined to the opinion, and my brethren who sat with me concurred in it, that whatever might be determined as to the principal question in this case, the goods having got into the hands of an innocent third person, the taking them a second time by Tuttle, while the property of Dow continued, might properly be considered as a new theft; and in that case they were, even admitting the objection of the defendant's counsel, stolen within this state. But I do not choose that my opinion should rest upon that circumstance, as I am satisfied that, independently of it, the conviction is right.

The only case relied upon, as directly in point, is that of the pirates, in 3 Inst. 113: "Butler and other pirates, in summer vacation, robbed divers of his majesty's subjects upon the coast

of Norfolk, upon the high seas, and brought divers of the goods taken into the county of Norfolk, and there were apprehended with the goods; the question moved to Wray, chief justice, and justice Peryam, justices of assize in Norfolk was, whether they might be indicted of felony in Norfolk, as if one steal goods in one county and carry them into another, he may be indicted in either county; and it was resolved by them that they could not be indicted for felony in Norfolk, because the original taking was no felony whereof the common law took conusance, because it was done upon the sea, out of the reach of the common law, and, therefore, not like the case where one stealeth in one county, and carrieth the goods into another, for the original act was felony, whereof the common law took conusance." The only reason which appears to have influenced the court was, that the jurisdiction of another court of the same government had attached previous to any crime having been committed of which that court had jurisdiction. But it does not determine that if goods had been stolen in another country, and brought into England, the fraudulent possession there would not have been considered such a taking as to have constituted it a theft.

But it is said that we have no means of determining what acts will constitute a theft in New Hampshire. To this I answer that I know not why we might not inquire, if it was necessary, what, in this respect, is the law in that state. But it is not necessary. The crime of theft is local, and can be tried nowhere but in the county where it is committed; and, therefore, there must have been a theft by Tuttle, as charged in the indictment, or the defendant is not guilty. We know, however, that goods taken as these were still continue the property of the owner. When so taken in New Hampshire, and brought into this state, those goods were still the property of Dow. Not only the property, but the possession also, in legal contemplation, continued in him; and every moment's continuance of the trespass is as much a wrong as the first taking, and may as well come under the word *cepit*: 1 Hawk. P. C. c. 33, sec. 9. And hence it follows that Tuttle did take, wherever he had, the goods. It is, however, said that although Tuttle might be punished in this state, he may still be punished in New Hampshire. And wherefore should he not? For myself, I feel no such tenderness for thieves, as to desire that they should not be punished wherever guilty. If they offend against the laws of two states, I am willing they should be punished in both.

The mischiefs which would result from the establishment of a

principle whereby a commerce in stolen goods might be carried on with impunity, are incalculable. A depot of plunder might be here established, and gangs of desperate villains employed in the neighboring states for its support, and all the remedy that could be afforded to the injured would be by actions, which in nine instances out of ten, might fail, for want of identifying the property; for the owners could not be witnesses in their own behalf. Should goods be stolen by one of a gang in New Hampshire, and sent to his partner here, by an innocent carrier, although the receiver might not be punishable as accessory for receiving stolen goods knowingly, yet I have no doubt but that he might be amenable to justice as a principal offender. But whatever I might think upon this question were it *res integra*, I now feel myself bound by authority. The case in York was many years ago decided, and as we are informed by the chief justice, on solemn argument. In the case in Bristol, although it was in a trial to the jury, the law was taken to be established. I myself remember many cases where similar convictions have taken place, and no question made but that they were right. It is now, therefore, much too late to call in question the principle. If the legislature perceive any mischiefs from the establishment of it, it is in their power, and in their power only, to correct it.

DANA, C. J. We all concur in opinion upon this point. In the case of *Paul Lord*, York, June term, 1792, which has been referred to, this objection was taken and fully argued on the trial. The counsel for the defendant proposed to take a special verdict; but as the facts were all before the court, and they agreed in opinion upon the law, the jury were instructed that the indictment appeared to the court to be well maintained by the evidence, if they found the facts true. They accordingly found a general verdict of guilty, and the point was not afterwards stirred. I recollect also another case, so long ago as when the late Judge Trowbridge was attorney-general. A man had been from this province into Rhode Island to purchase sheep. On his way home, while yet in their government, some other sheep joined his flock, and he drove them all into the county of Bristol, where he was indicted and convicted. Great mischiefs would follow from a contrary determination, which would also overthrow three solemn decisions of this court, which are now remembered; and I believe, if our records were searched, many more would be discovered. There have been many instances, I am satisfied, of persons who have stolen

horses in the neighboring states, and, having been pursued and found in possession of them in this state, have been here indicted and convicted. The principle appears to me well established, that the original taking being felonious, every act of possession continued under it, by the thief, is a felonious taking, and wherever he carries the articles stolen, he may there be indicted, convicted, and punished for the felony.

The offense charged on the defendant is the receiving the goods in Boston, knowing them to have been stolen. If the principal could be tried and convicted in this county, the accessory may be tried and convicted here also.

The same reason which authorizes a conviction, in the case of stealing goods in one county and bringing them into another, applies, in my mind, to the case of stealing in one state and bringing them into another, viz.: that every moment's felonious possession is, in contemplation of the law, a new taking, stealing, and carrying away.

Having respect, then, to principles as well as to cases solemnly decided, I do not see sufficient ground for granting a new trial.

New trial refused.

See *State v. Brown*, 1 Am. Dec. 518, and note. There a different decision was given in North Carolina. In the note to that case it is shown what states adopt the doctrine of *State v. Brown*, and what follow that laid down here in Massachusetts.

In *Commonwealth v. Andrews*, 3 Mass. 126, it was held that an indictment against the defendant could not be maintained unless the principal had been convicted. The question of the guilt of the defendant came before the court on a motion in arrest of judgment; because of the principal not having been convicted, it was contended no conviction could be had against Andrews. The defendant was tried, upon a plea of not guilty, in March, 1807, before Parker, J., when the jury returned a special verdict as follows: "The jury find that the said Thomas Andrews did feloniously have and receive the goods mentioned in the indictment, in manner and form as is therein set forth, knowing the same to have been stolen; but they do not find that Amos Tuttle, the principal mentioned in said indictment, was ever convicted of the theft therein alleged; and whether the law be such, that the said Andrews can be lawfully tried and convicted of the charge in said indictment, before the conviction of the said Tuttle, the jury are ignorant, and pray the advisement of the court; and if the law be such that the said Andrews can be thus convicted, the jury find him guilty in manner and form as alleged in said indictment; otherwise they find him not guilty."

Attorney-general Bidwell, for the commonwealth.

Otis, for the defendant.

By Court, PARKER, J. [Having first reviewed the facts.] By the common law it is clear that no accessory can be tried and convicted,

unless the principal has been either previously convicted or outlawed (which amounts to a conviction), and evidence thereof given to the jury; or unless the principal be charged in the same indictment with the accessory, and tried at the same time; in which latter case the jury must first inquire of the charge against the principal, and determine that to be true, before they proceed against the accessory. The only exception to this rule seems to be, when the person charged as accessory shall himself request to be put on trial before the principal; and even then, upon conviction, judgment against him is to be suspended until the principal shall be prosecuted and found guilty. Foster on Accomplices, c. 2, p. 360, 343; 1 Hale's P. C. 623; 2 Id. 224. Cases having often occurred, in which the guilt of the accessory was manifest, but punishment could not be inflicted, because of the concealment or escape of the principal, more especially in crime of the nature of that set forth in this indictment, it was provided by the statute of 1 Anne, c. 9. sec. 2, that when the principal could not be taken or prosecuted, the receiver of the stolen goods might be prosecuted, and punished for a misdemeanor.

Our statute upon the same subject adopts the principle, and provides that when the principal is not known or prosecuted, the receiver shall be guilty of a misdemeanor, and punished in the same manner as the principal would have been if convicted. The same section of the statute constitutes the receiver of stolen goods knowingly, an accessory; and he must be proceeded against as such, unless the principal be not known or prosecuted.

The facts charged against the defendant, therefore, making him an accessory, according to the terms of the statute, provided the principal were known or prosecuted, it will be necessary to ascertain in what character he is by the indictment prosecuted, whether as accessory, or as having committed a misdemeanor. There is no allegation that the principal is not known or prosecuted, which would seem to be proper, if not necessary, in order to keep up the distinction which the legislature has seen fit to adopt, with respect to the guilt of the receiver under different circumstances. And we find, by examining precedents, such allegation always made when the party is proceeded against for a misdemeanor only. We find also that this indictment is conformable, in every particular, to the forms in the books of precedents, where the party is charged as accessory; the principal being formally accused in the same bill, and the receiving being stated to be felonious, which seems to negative the idea of its being a mere misdemeanor, which the grand jury intended to fix upon him. We must, therefore, consider the defendant in this case to be indicted as accessory to the felony alleged to have been committed by Amos Tuttle; which being the case, he ought not, according to the principles before stated, to have been tried until Tuttle had been tried and convicted, unless he consented thereto. It has been insisted by the attorney-general that his having pleaded to the indictment, and having suffered a trial without claiming this privilege, are circumstances sufficiently indicative of a waiver of his right in this particular, and of his consent to the proceedings as they took place. But we are of opinion that no such assent can be implied from his submission to the course directed by the attorney-general or by the court. In criminal cases, an express relinquishment of a right should appear before the party can be deprived of it. Here is no such relinquishment, but merely a silent submission, which probably arose from ignorance at the time that such right existed. It is, however, said by the attorney-general, that the eleventh section of the statute, giving the jury authority to convict of a crime of a

lower denomination than the one charged, provided such a crime be substantially proved, applies to this case; and that under the special verdict as found, the court may enter judgment against the defendant for a misdemeanor, that being essentially found by the jury. But whether the jury have the power contended for, need not be decided, it being clear that they have not exercised it. They convicted the defendant of the whole offense, in manner and form as set forth in the indictment, if the court deem such conviction under the circumstances to be legal; otherwise they entirely acquit. The court have no authority given them to depart from the alternative presented to them by the special verdict.

We are of opinion that judgment, for the cause set forth in the motion, must be arrested.

RICHARDSON v. NOYES.

[2 MASS. 56.]

EXECUTORY DEVISE.—A devise was made in these words: "I give unto my three sons, A., B. and C., all my other lands, etc. Also, my will is that if either or any of them should die without children, the survivor or survivors to hold the interest or share of each or any of them so dying without children as aforesaid." It was held that an estate in fee-simple passed, determinable on the contingency of the children dying without issue, and on that contingency vesting in the survivor or survivors by way of executory devise.

WRIT OF ERROR. From an agreed case the following facts appeared. John Noyes, seised in fee of certain land, made his will. The preamble recited: "And as touching such worldly estate as it hath pleased God to bless me with in this life, I do demise and dispose of the same in manner and form following." Then follows a devise of the improvement of his dwelling-house in Sudbury, and of one-third of his lands there, to his widow during her widowhood, together with certain legacies to her. Certain lands are then given to Jonas, the eldest son, without words of limitation. Then follows: "Item, I give to my three sons, John Noyes, James Noyes and William Noyes, all my other lands, with all the appurtenances lying in Sudbury, except the improvement of one-third reserved for my wife, as above mentioned; also, my will is, that if either or any of my three last-named sons, John, James or or William, should die without children, the survivor or survivors to hold the interest or share of each or any of them dying without children, as aforesaid. Also, my will is, that my husbandry tools and negroes shall be equally divided amongst and between my three sons, John, James and William, last mentioned, to be possessed by the survivor or survivors, as above mentioned."

Other lands were devised to the four sons, without words of limitation; a legacy given to the daughter, the interest whereof was directed to be paid her during the joint lives of herself and husband, and the principal after the death of her husband; but in case she did not survive him, to be divided among her children, to be paid them at their majority; and then, following a certain other specific bequest, was the residuary clause, whereby he gave and bequeathed the residue of his estate, real and personal, to be divided equally amongst his children, his daughter's share to be retained by the executors, and disposed of as in the case of the legacy to her.

After the testator's death, John, James and William entered upon the lands devised to them, and made partition thereof. James married Mary, the defendant below, and died leaving her *enciente*; she was delivered of a son, who lived but a few days, and Mary thus became the next of kin and heir to James.

The original declaration filed by John and William Noyes against Mary Noyes set forth three counts, wherein plaintiffs claimed the premises in question as remaindermen in tail in fee, and for life respectively. The plaintiffs recovered judgment. To reverse this judgment a writ of error was taken to this court, in the names of Mary and Thomas Richardson, with whom she had intermarried.

The question was, what estate did James Noyes take under the will.

Attorney-General Sullivan and Bigelow, for the plaintiffs in error.

Parsons and Dexter, for the defendants.

SEDGWICK, J. In every question arising on the construction of a will, it is alike dictated by justice, common sense, and the rules of law, that the first inquiry shall be, what was the true intention of the testator? And if that can be satisfactorily discovered, the next is, can such intention be carried into effect consistently with the rules of law? And if so, such must be the decision. The question on which this case depends is, what estate did James take under the first devise to him? If an estate tail, then are the demandants entitled to their judgment; otherwise not. This general question may make it of some importance to consider: 1. Does the devise give an estate for life to James, and a fee to his children, if he should have any, by way of executory devise, as was suggested by the attorney-general in his argument? 2. Did James and his brothers,

by this devise, take an estate tail, with cross-remainders either in fee, or in tail? 8. Did the three sons take estates in fee, respectively, determinable on the contingency of their dying without children, and on that contingency vesting in the survivor or survivors, by way of executory devise? James, under the will, took either an estate for life, in tail, or in fee.

1. Did he take an estate for life? The general rule of law laid down, and, as far as is recollected, without contradiction, is that in a devise of lands to one without words of limitation, the devisee takes an estate for life only, unless it can be found, from the whole of the will, taken together and applied to the subject-matter of the devise, that it was the intention of the testator to give a fee. But if, from the whole of the will, so taken together and applied to the subject-matter, it can be collected that the testator intended to give a fee, it ought to be so construed, in order to give effect to such intention: *Vin. Abr.*; *Bacon*; *Wooddeson*, *Comyn's Dig.*; *Rowe v. Blacket*, 1 Cowp. 235; *Hogoin v. Jackson*, Id. 299; *Loveacres v. Blight*, Id. 352; *Denn v. Gaskin*, 2 Id. 657; 2 Bl. Rep. 1045; *Right v. Sidebotham*, Doug. 759. And I do think that courts ought to make liberal constructions of wills, and not to restrain in the consideration of those circumstances which tend to enlarge from life estates to fees; for I am satisfied that the idea expressed by Lord Mansfield, in *Loveacres v. Blight*, 1 Cowp. 355, is correct. Speaking of the rule above mentioned, and the cases wherein devisees had been construed to give only estates for life, he says: "I really believe almost every case determined by this rule, as applied to a devise of lands in a will, has defeated the real intention of the testator. For common people, and even others, who have some knowledge of the law, do not distinguish between a bequest of personalty, and a devise of land or real estate. But, as they know, when they give a man a horse, they give it to him forever, so they think, if they give a house or land, it will continue to be the sole property of the person to whom they left it." The same idea that great man repeated almost as frequently as the subject came before him.

It is obvious that the will in this case was written by an unskillful person. Technical accuracy and precision are not therefore to be expected. We are inquiring for the intention of the testator; and it is clear, from a view of the whole instrument—the preamble, the provision which he makes for all his children, and the ultimate disposition which he makes by the residuary clause of any residue which might remain after the

specific distribution—that he intended a complete disposal of all the property he should leave behind. And I have no doubt that he intended that his sons should take an estate of inheritance. Whether that can be construed to be the legal intention, as respects the first devise to Jonas, it is not necessary now to determine. The question is not before the court; but that it was the real intention I entertain not the smallest doubt. The fee was certainly intended to vest in children or grandchildren. Whether any of the latter existed at the time the will was made, or not, we are ignorant. But in either case, no motive is suggested why the testator should entertain a more favorable regard for his grandchildren, and make a better provision for them than for his own children. That Jonas was a favorite son is evident by his being admitted to the executorship, and all the rest excluded. Yet if, by the first devise to him, he was intended to take a life estate only, his children are almost wholly excluded from the succession; they have no chance of benefit, but from the residuary devise, except as to the lands in Princeton and Mendon. They are even less regarded than the children of the daughters, and greatly distinguished from the children of the other sons—a distinction which it is impossible should have been intended by the testator. From this consideration alone we might conclude, with a good degree of satisfaction, that an estate of inheritance, by virtue of the first devise to Jonas, was intended to be vested in him; and if so, there can be no doubt that as large an estate was intended to be vested in John, James, and William, by virtue of the devise to them. But there are other circumstances of great weight to be considered. A devise is given to the wife for life, determinable, indeed, on her marriage. He gives to her the improvements of the real estate. To the sons he gives the land itself; and even in the devise to John, James, and William, this improvement is again mentioned as an exception during the continuance of the wife's estate. The supposition does not, I think, partake of great refinement, that the testator, when he devised the thing itself, intended to give his whole estate in it; and, when he intended a term only, he thought he had given only a right to the temporary occupation, which he meant to express by the word "improvement." The devise to his daughter Mary Maynard, as well in the specific legacy as the residuary clause, shows that he looked forward to his grandchildren as intended to be benefited by his will, and to confer that benefit on them as the representative of his own children,

and as taking in succession from them. The anxiety which the testator showed to provide for his family, by vesting the share and interest of him, or them, who should die without children, in the survivor or survivors, tends to strengthen this construction. If there should be children, the estate was, by implication, to go to them; if not, to the survivor or survivors. This share and interest, which was to go to the devisee and his children, if he had any, was to vest in the survivor or survivors, if he had none. It then depended on the contingency of dying with or without children, whether either of the three sons should have more than his equal proportion of the devised premises. A devise to one, and, if he die without issue, remainder over, is an estate tail, from the manifest intention of the testator: 1 Vent. 230; Cro. Jac. 448, 695; 1 P. Wms. 229; so also a devise to one, and, if he die without children, remainder over may be an estate tail: 4 Burr. 2246. Now, with us, all the children are heirs; and as this is a devise to the three sons and their children, or in effect heirs, it could not be an estate for life only. It was then intended to give an estate of inheritance, either in tail or in fee.

2. Was an estate tail intended? I think not. In deciding this question, an observation made by the counsel for the plaintiff in error is, in my opinion, of great weight, viz: that in construing language, the customs, manners, habits or laws relative to the subject-matter of it, are to be taken into consideration. In England, lands conveyed to a man and his heirs generally descend to his eldest male issue. If to a man and the heirs of his body, they descend in the same manner. If lands here are conveyed in the same manner, in the former case they descend to all his children, and in the latter to his eldest male issue. In England, if a devise be made to one and his heirs generally, or to the heirs of his body, and the devisee die, leaving an eldest son and several other children, the whole goes to such son. But here, in that case, the above distinction would take place; the fee-simple would go to all the children; the fee-tail to the eldest son. In this case the children, if any, of the devisees are to take; to them the estate is given by the will. Did the testator intend, by children, the eldest son? It is impossible for me to believe that he did. And if by children he meant what, in common parlance, would be understood all the children, then he intended a fee-simple, and not a fee-tail. If, by the devise, to the "survivor or survivors," he meant that he or they should take whenever there should be an indefinite failure

of issue, and not till then, however distant that period might be, then he intended a fee-tail; and if, by this expression, he contemplated events which were to take place in the life of the devisees, then he did not intend a fee-tail. That this was the meaning of the testator is, in my opinion, clear from the will itself. The bequest of personal property, which immediately follows the devise to them, is in these words: "Also, my will is, that my husbandry tools and negroes shall be equally divided amongst and between my three sons, John, James and William, last mentioned, to be possessed by the survivor or survivors, as above mentioned." This shows that it was the intention of the testator that the right to the real and personal estate should rest, by survivorship, upon the happening of the same contingency. No other reasonable construction can be given of the expression, "being possessed by the survivor or survivors, as above mentioned." The survivors were to be thus "possessed" how and when? The devise answers the question: when "any or either of them should die without children." On the happening of that contingency, and whenever it do happen, the right accrues of being "possessed" alike of the real and personal estate. Did the testator intend that this right should accrue when there should be an indefinite failure of issue, and not till then; an event which might not take place in a century; a period when neither the negroes nor the husbandry tools would be in existence? The supposition is absurd. This view of the subject shows clearly that the event contemplated by the testator, which was to give a right by survivorship, was to happen within the lives of the immediate devisees; and, therefore, it cannot be considered as an estate tail, where the estate continues until there is an indefinite failure of issue. We may, then, I think, pretty confidently conclude that the testator intended:

3. That the three sons, John, James and William, should take respectively an estate of fee-simple, determinable upon the contingency of their dying without issue, and on that contingency vesting in the survivor or survivors, by way of executory devise. Now, whether this intention can or cannot be carried into effect is not very material to be determined in this case, because the demandants' right to recover depends on the devise being construed a fee-tail, which, I think, it is shown it could not be. But I think the rules of law will recognize the devise as a fee-simple, and, on that construction, execute the plain intention of the testator. It is not necessary, to constitute it a

fee-simple, that it should be absolute. It may be a fee-simple determinable, as where lands are given to a man and his heirs as long as another man shall have heirs of his body and the like: Powell on Devises, 230; Plow. 557. It may be a base fee, as where, in England, tenant in tail, by indenture enrolled, bargains and sells the land to another and his heirs, and afterwards levies a fine to the bargainee, the bargainee has a fee in the land, but it is only to endure as long as the tenant in tail has heirs of his body, and is therefore called base, as compared with the pure fee, which is in the original donor, and which has an absolute perpetuity belonging to it: Powell on Devises, 231; Plow. 557; 1 Inst. 6; 1 P. Wms. 74, 75; Ld. Ray. 1148. So, also, before the statute *de donis*, an estate to a man and the heirs of his body was a fee-simple conditional. These are conveyances other than wills; the vesting of estates in fee by way of executory devise will be more particularly attended to hereafter. It will not be useless to take notice of the attention which has been paid by courts to a liberal construction of wills, that the intention of the testator might be carried into effect.

In *Loveacres v. Blight*, Cowp. 352, Lord Mansfield, in delivering the opinion of the court, says: "Wherever there are words, either general or particular, or clauses in a will, which the court can lay hold of, to enlarge the estate of a devisee, they will do so, to effectuate the intention." In *Spalding v. Spalding*, Cro. Car. 185, a devise, after the death of the testator's wife, to J. S. and the heirs of his body in fee, and if J. S. should die in the life of his wife, that W. should be his heir. J. S. did die in the life of the testator's wife, and yet, against the words of the will, it was determined that the estate should not go to W., but to the heirs of J. S. A devise, Cro. Eliz. 525; Dyer, 33a, to a son and his heirs, and if he die before twenty-one years of age, or without issue, then to another son. He did die before twenty-one years of age, yet it was adjudged that his issue should hold. In *Lexford v. Cheeke*, 3 Lev. 125, a devise to a wife for life, if she do not marry; but if she do marry, then with several limitations; she did not marry, and although the devise over, according to the expression, seemed to depend on the marriage of the wife, yet was it adjudged an estate tail. In *Robinson v. Robinson*, 1 Burr. 38, a devise to Launcelot Hicke "for and during the term of his natural life," is construed an estate tail, "to effectuate the manifest general intent of the testator." In *Evans, ex demise Brooke v. Astley*, 3 Burr. 1570, a devise, after several limitations, to every

son, and sons of Charles Buckenfield which shall be begotten on the body of Sarah, his now wife; although it was agreed by the court that the words of the will made the sons joint-tenants, yet, because the construction must be agreeable to the intention of the testator, and as, from a consideration of the whole will, it appeared impossible that should have been his intention, but that the sons should take in succession an estate tail, it was accordingly so adjudged. In *Newland v. Shepherd*, 2 P. Wms. 194, Mr. Shepherd, after the devise of several parts of his real and personal estate to several persons, devises the interest and produce of the surplus of his real and personal estate to trustees, their heirs, executors and administrators, in trust to pay and apply the produce and interest thereof for the maintenance and benefit of such of his grandchildren as should be living at the time of his death, until his grandchildren should come to the age of twenty-one years, or be married; and he went no farther, nor made any other disposition of his estate. It was, however, determined that this would pass the absolute right and property of the real and personal estate to the grandchildren. Let this case be compared with the one under consideration. In *White v. Barber*, 5 Burr. 2703, a devise to a child, with which the wife of the testator should be enciente at the time of his decease, was construed to effectuate his intention to vest the estate in children born after making the will and before the death of the testator.

In *Statham v. Bell*, Cowp. 40, the testator supposing his wife to be enciente, made a devise to the child, if he should be a son, when he should attain the age of twenty-one years, but if a daughter, then one moiety of his estate to his wife, and the other moiety to his two daughters, he then having one daughter, when they should attain their age of twenty-one years, with survivorship between the daughters. If they should both die before twenty-one, their moiety to go to the wife and her heirs forever; if she died, her share to go to them. The wife proved not to have been enciente. The testator died, and so did the daughter, without issue, and under age. It was determined that the wife should take the whole estate. A devise, 6 Mod. 110, to give to his children, to dispose of at will and pleasure; to a wife, to dispose thereof upon herself and children, 6 Mod. 4, give fees. A. devises to A. for life, and then to his son, except A. purchases land of the same value for his son, and then the devisee shall sell; A. does not purchase; his son has a fee:

Hob. 65; Cro. Jac. 599. A devise to three daughters, and if one dies before the others, one to be heir to the other, gives a fee: 1 Roll. Ab. 833, l. 45; a case differing nothing in principle from the one under consideration. A devise to A., and if he dies under age, to the heirs of the devisor: 2 Saund. 388; so a devise to A., but if his father purchase land of like value, to another, A. has a fee: Hob. 65. So the words "whatsoever else I have in the world," have been construed to give a fee: 1 Salk. 239; 2 Ver. 687. It would be endless to state, in the most concise manner possible, all the cases which have been decided on the same general principle of justice, carrying into effect the meaning of the testator, and for this rejecting some words, supplying others, transposing words and sentences, in some particulars contracting and in others enlarging; and all this that the right which a man has of deciding, according to his own will and pleasure, who shall enjoy, after his decease, the property he may leave behind, may be carried into effect. Instances of this kind are abundantly supplied by Viner, Comyns, Bacon, and by Gilbert and Powell on Devises. Let the general scope and tendency and reason of those decisions be compared with, and applied to, the case under consideration. In this case, the will was drawn by a man of no professional knowledge. The estate is certainly intended to go to the children, by which, on the part of the demandants, it is contended that the testator did not mean children, but eldest son, if there was one; when, in all probability, neither the testator nor the writer knew there was any such course of descent. If there are no children, it is to go to the survivor or survivors, together with husbandry, tools, and negroes. When was this event, as contemplated by the testator, to take place? We are told whenever there should be an indefinite failure of issue, however distant the period, whereas it is a thousand to one that the testator, so far from so intending, knew nothing of that artificial reasoning which gave rise to the expression indefinite failure of issue, and probably had never heard it.

I have already stated that it was the intention of the testator that the three sons, John, James, and William, should take, respectively, an estate of fee-simple, determinable on the contingency of their dying without issue, and on that contingency vesting in the survivor or survivors. This is an executory devise. Executory devises, as they respect estates of inheritance, are of two kinds: 1. A substitution of one fee for another which fails; 2. Of a fee to commence at a future time, without the

support of a particular estate. This is of the former kind. Although the law will not recognize a remainder to take effect after the expiration of a fee, yet, by way of indulgence to a man's last will and testament, conformably to the liberal intention of the statutes of wills: 32 Hen. VIII, c. 1, 34 and 35 Id. c. 5; and in favor of devisors, when otherwise the words of a will would be void, it permits, under certain restrictions, a fee or other estate to be substituted as an alternative in the place of a fee before limited; provided the substitution be to take place within a reasonable period of time. Devises of this nature are called executory, because the estates thereby limited to take place, have no present existence, in consideration of law, but merely a capacity of existence, and being executed; taken effect when the contingency upon which they are limited occurs. I shall mention some cases as illustrative of the general description which I have given of executory devises. In the case of *Marks v. Marks*, 10 Mod. 419; 1 Str. 129, a devise of lands to a man's wife, remainder to his second son in fee, provided that if "D.," his third son, should, within three months after his wife's death, pay five hundred pounds to C., his executors, etc., then the lands should go to "D." and his heirs; this is a good executory devise, and the possibility descended to the heirs of "D.," notwithstanding D. died in the life of the wife. The famous case of *Pells v. Brown*, Cro. Jac. 590, essentially settled the principles on this subject. It has been called the magna charta, in relation to it. It has been cited almost as frequently as executory devises have come before the court, and always with approbation; and it goes the full length of deciding the present case. There, the testator devised to A., his second son, and his heirs forever, and if he should die without issue living, B., his brother, then B. to have those lands to him and his heirs forever. It was adjudged that A. took an estate in fee-simple, and yet that the limitation to B. in fee was good as an executory devise. Now, if in the case under consideration, the testator meant by the word children what the word imports; if he intended the provision for the children generally, then he intended it for the heirs of the devisees; then was it, in other words, a devise to the devisees and their heirs, a devise in fee. If he meant by dying without children, truly a dying without children, and not an indefinite failure of issue, of which he knew nothing, and, therefore, could not mean; if by survivors, he meant to comprehend none but the immediate devisees, then this case compares most exactly with the case of *Pells v. Brown*.

In *Porter v. Bradley*, 3 T. R. 143, a devise of lands to A., his heirs and assigns forever, and if he die leaving no issue behind him, then over; the limitation over was determined to be good, by way of executory devise. This compares in principle exactly with the case under consideration. In *Wilkinson v. South*, 7 T. R. 555, a bequest of a term of years to the testator's son, S. Parker, and to the heirs of his body lawfully begotten, and to their heirs and assigns forever, but in default of such issue, then, after his decease, to go to the testator's grandson, his heirs and assigns forever, the limitation over was held to be good, by way of executory devise. And in deciding the case, the court went upon this principle, that, if the words "leaving no issue," shall, from the whole will, be understood leaving no issue at the time of his death, then a further limitation over will be good, by way of executory devise. In *Roe v. Jeffery et al.*, 7 T. R. 589, a devise to T. F. and his heirs forever, and in case he should depart this life, and have no issue, then to E. and M. and S., or the survivor or survivors of them, share and share alike; it was determined that the limitation to E., M., and S. was a good executory devise. The chief justice, in delivering the opinion of the court, lays down the true principle. He says: "The question in this and similar cases is, whether, from the whole context of the will, we can collect that when an estate is given to A. and his heirs forever, but if he die without issue, then over, the testator meant dying without issue living at the death of the first taker." And I think, nothing is more certain than that the application of that principle is decisive of the present case; for nothing can be more clear than that by the "dying without children," in this will was meant the death of the first taker. I have entered thus fully into the consideration of the several questions which present themselves, out of respect to the former decision of the court, and the very ingenious and able argument of the counsel for the defendant in error. I conclude, after the most deliberate attention which I can give the subject, that the former judgment was erroneous, and ought to be reversed.

SEDGWICK, J., then observed that the late Judge Strong had, before his death, declared his concurrence in the same opinion; and that SEWALL, J., had also authorized him to say that he agreed in the result. The chief justice, apprehending himself interested in the event of the cause, declined giving any opinion. THATCHER and PARKER, not having been present at the argument of the cause, gave no opinion.

Judgment reversed.

So recently as *Brightman v. Brightman*, 100 Mass. 239, this case was cited to show when an executory devise was limited on a fee-simple. On this head it is also cited in *Morris v. Potter*, 10 R. L. 69, and in *Abbott v. Essex Co.*, 18 How. 214.

PEARSALL v. DWIGHT.

[2 MASS. 84.]

PLEADING STATUTE OF LIMITATIONS.—In an action upon a promissory note executed in New York by parties inhabitants of that state at the time, it was held that the statute of limitations of New York could not be pleaded in bar to the action in Massachusetts.

ACTION on a promissory note. The facts in the case fully appear from the opinion of the court. The question raised was, whether to an action in this state on a promissory note made and payable in the state of New York, the plaintiffs being inhabitants of that state, the defendants of this, a plea of the statute of limitations of New York was valid.

Ashman, on behalf of the defendants, contended that the *lex loci contractus* was to govern, except where the parties at the time had a view to a different state or country: *Robinson v. Bland*, W. Bl. 258; *Holman et al. v. Johnson*, Cowp. 343; *Moslyn v. Febrigas*, Id. 175; *Smith et al. v. Buchanan et al.* 1 East, 6; *Johnson et al. v. Smith*, 2 Burr. 950. What would have been a good defense in New York, will be a good defense here: *Inglis v. Usherwood*, 1 East, 515; *Melan v. Duke de Fitzjames*, 1 B. & P. 138.

J. C. Williams, for the plaintiffs, contended that the statute of limitations has been generally considered as only destroying the remedy and not affecting the merits: *Nash v. Tupper*, 1 Caines, 402; (2 Am. Dec. 197;) and that in construing the statute, the courts have uniformly adhered to the letter thereof: *Bevil's case*, 4 Co. 8; *Ewer v. Jones*, 2 Ld. Raym. 934; 2 Vent. 345; 1 *Hollis's case*, 2 Ld. Raym. 1204; *Strithorst v. Graeme*, 3 Wils. 145; *Quantock v. England*, 5 Burr. 2630. The *lex loci contractus* does not always govern: 2 Burr. 1084. It has been determined in New York in *Lodge v. Phelps*, Johnson's Cases, 139, that the principle of the *lex loci* shall not affect the form of the action, but shall have reference only to the nature and construction of the contract and its legal effects, not to the mode of enforcing it.

PARSONS, C. J. From the record in this cause, the declaration appears to be on a negotiable cash note, payable by the

defendants to the plaintiffs, or their order, on demand. To this declaration there is a plea in bar, alleging that the plaintiffs long before, at the time, and ever since the note was executed, were inhabitants of the state of New York; that the note was there made; that before it was made, and six years before this action was commenced, there was a statute of that state still in force, which, among other things, limited the time of suing an action of this description to six years next after the cause of action accrued, which part of the statute is particularly pleaded with a profert of the exemplification of the whole statute, and there is the averment necessary to bring this action within that statute.

The plaintiffs, in the replication, neither pray over of the exemplification of that statute, nor particularly plead any exceptions made in it, but confess and would avoid the bar by alleging that the defendants were, during all the time, inhabitants of this state. The defendants, in their rejoinder, confess and would avoid the replication by averring that since the making of the note, and more than six years before this action was commenced, the defendants went and returned to the state of New York, and were there ten days, with the knowledge of the plaintiffs. To this rejoinder the plaintiffs demur generally, and the defendants join in demurrer. Whether this rejoinder be good is the issue in law immediately before the court.

If the matters alleged in the replication are sufficient to avoid the bar, the rejoinder must be bad, because it neither traverses those matters, nor shows any provision of the statute of New York by which the effect of the replication is avoided by the collateral facts pleaded in the rejoinder. For the same reason, if the matters alleged in the bar are sufficient in law, the replication must be bad, for the plaintiffs do not plead any exception in that statute by which the bar, when confessed, may be avoided. Notwithstanding the profert of the exemplification of that statute, yet, if it contained any exception on which the plaintiffs intend to rely, they ought either to have prayed over, and spread the whole statute upon the record, or to have particularly pleaded such exception in their replication, and then to have made the allegation necessary to bring their case within it. This reason is grounded on the opinion that if that statute can avail in this court, when pleaded in bar, the bar cannot be avoided but by virtue of some provision of the same statute. As the pleadings now are, the court cannot take notice of any parts of that statute, but of those which are particularly shown

in the bar. Although the rejoinder be bad, yet if the replication is also bad, the defendants must have judgment if the bar be good.

Thence, the great question in the cause is whether, to an action commenced in a court in this state by the plaintiffs, inhabitants of New York, on this note there executed by the defendants, inhabitants of this state, the statute of limitations of the state of New York can be pleaded in bar. That the statute of another state cannot, *proprio vigore*, have the force of law in this state, is very clear, and its effect in this court must depend on the laws of the commonwealth.

It is a general rule that personal contracts entered into and to be performed in any one state, and which are there valid, are to be considered valid in every other state. This rule is founded on the tacit consent of civilized nations, arising from its general utility, and seems to be a part of the law of nations adopted by the common law. To give effect to contracts of this description in an act of comity due from the courts of the state in which such contracts may be sued to the state in which they may be made, this rule is subject to two important exceptions: 1. That neither the state in whose court the contract is put in suit, nor its citizens, may suffer any inconvenience by giving the contract effect; and, 2. That the consideration of the contract be not immoral, and the giving it effect will not have a bad tendency. Under these exceptions, the cases which do not come within the rule may be classed.

The contract on which this action is founded is clearly within the rule. It was made in New York, and might there be performed. The plaintiffs, when it was made, were inhabitants of that state, and so are the defendants to be considered in this cause, by going and making the contract there. The contract, when made, was valid by the laws of New York; the giving it effect here cannot be injurious to the commonwealth, or its citizens, nor have an evil tendency; and the consideration is not immoral. The court are therefore obliged, by the laws of the commonwealth, to consider it as a valid contract, according to the true construction of the rule.

The party claiming the benefit of the note in this case was sued it originally in a court in this state; the law of the state of New York will therefore be adopted by the court, in deciding on the nature, validity and construction of this contract. This we are obliged to do by our own laws. So far the obligation of comity extends, but it extends no farther. The form of

the action, the course of judicial proceedings, and the time when the action may be commenced, must be directed exclusively by the laws of this commonwealth.

These are matters not relating to the validity of the contract, and to permit the laws of another state to control the court in its proceedings concerning them, would intrench upon the authority of our own laws unnecessarily, and for no principle of common utility. Cases may also be supposed in which this permission might be injurious to our citizens. If the state in which the contract was made had no statute of limitations, then by the *lex loci*, the action might there be commenced at any time, and if the plaintiff should afterwards remove to this state, and commence his action in our court, the defendant would be deprived of the benefit of the limitations here in force. That the form of the action must be conformable to our laws, the case of *Folliot v. Ogden*, 1 H. Black. 135, is an authority. In giving the opinion of the court, Lord Loughborough considers it as law that, when a bond made in a foreign state, by whose laws it is assignable, is sued at law in England, the suit must be according to the laws of England, in the name of the obligee, and not of the assignee, although it be for his use, because there bonds are not assignable at law. As to the time when the suit may be commenced, no authorities in point have been cited from our books, nor do I recollect any; but the subject has been considered by foreign jurists of great merit.

In the Prelections of Huber, under the title *De Conflictu Legum*, vol. II, lib. 1, he states a case in which an action was commenced in a court of Friesland, by a Hollander against a Frieslander, on a contract made in Holland, and the limitation in force in Friesland was pleaded against the action. The Hollander contended that it could not be pleaded against him, to that contract which was to be decided by the *lex loci*, or the laws of Holland. But the judgment was against the Hollander. After mentioning another case upon execution, in which the *lex loci* was not allowed to govern, the author adds: "*Hæc est ratio, quod prescriptio et executio non pertinent ad valorem contractus, sed ad tempus et modum actionis instituendæ, quæ, per se, quasi contractum separatumque negotium constitet; adeoque receptum est optima ratione, ut in ordinandis judiciis, loci consuetudo ubi agitur, etsi de negotio alibi celebrato spectetur.*"

It is therefore the opinion of the court that the plea in bar is not good. Consequently the judgment on the demurrer must be, that it appears to the court that the rejoinder is bad and insufficient in law, etc.

WALES v. STETSON.

[2 MASS. 143.]

VESTED CORPORATE RIGHTS. — Rights legally vested in a corporation cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation.

TURNPIKE-GATE OBSTRUCTING PUBLIC HIGHWAY. — The proprietors of a turnpike road have no authority to erect a gate upon an existing public highway, unless specially authorized by the legislature.

ACTION OF TRESPASS. The declaration contained two counts; one for passing a turnpike-gate without paying the legal toll; and the second for cutting down the gate.

The cause was submitted on a statement containing the following facts: The corporation of which the plaintiff was treasurer, was authorized by law to make a certain road, and, when approved by the court of sessions, to erect a toll-gate thereon near the dwelling-house of Joseph Hunt; that the road was made and approved. By the act of incorporation, it was provided, that whoever should cut, break down, or otherwise injure or destroy said gate, or should forcibly pass, or attempt to pass by force without paying toll, such person should pay to the corporation a fine not exceeding fifty dollars, nor less than five dollars, to be recovered in an action of trespass brought by the treasurer thereof. The gate was erected on a part of the turnpike road, where was before an ancient public highway; it was near the house of Joseph Hunt, but might have been placed nearer thereto, and in a part of the road which was not formerly a public highway. Stetson, on the twenty-ninth March, 1806, forcibly passed the gate without paying toll, and in the evening of the same day, cut down the gate.

It was agreed, that if the corporation were legally entitled to erect the gate where they did, then defendant should be defaulted; if otherwise, the plaintiff should be nonsuited.

Attorney-general Sullivan and Richardson, for the defendant, denied the corporation had any authority to erect a gate on a road previously existing; and argued, that the discontinuance of a road cannot take place by mere implication; it must be in a mode prescribed by law; that the legislature must have intended that the gate should be placed nearer Hunt's house, so as not to interfere with existing rights; and the corporation, in erecting the gate, have erected a nuisance on an old and public road. The general act respecting turnpikes passed before the

time of erecting this gate, prohibits the erection of any gate on an old road; and the expression of the statute is general; it is to be considered as operating on all turnpikes, whether existing at the time or established afterwards. This general act was unquestionably intended to be explanatory of all past statutes establishing turnpikes. One section of the statute enables turnpike corporations to purchase the land over which they make their road; but of whom are they to purchase a public highway, belonging to all the citizens of the commonwealth?

Whitman, for the plaintiff, contended that although the legislature might deem it a good general regulation; that turnpike-gates should not be erected on old roads, they might, however, if they saw fit, grant a right over such road, and this was a less interference with existing rights, than laying a new public way over the lands of a private owner.

By Court, PARSONS, C. J. After considering the several points made in this cause by the counsel, we are satisfied that the question submitted must be decided according to the legal construction of the act incorporating the proprietors of this turnpike. We are not prepared to deny a right in the general court to discontinue, by statute, a public highway. It is an easement common to all the citizens who are represented in the legislature. The authorizing of the erection of bridges over navigable waters is, in fact, an exercise of a similar right. We are also satisfied that the rights legally vested in this, or in any corporation, cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation.

In the consideration of the provisions of any statute, they ought to receive such a reasonable construction, if the words and subject-matter will admit of it, as that the existing rights of the public, or of individuals, be not infringed. And we are of opinion that this act of incorporation reasonably admits such construction. The corporation had a right to make the turnpike over such parts of the old road as lay in their way. This affects no existing rights, as the easement remains. But before we construe the statute as giving an authority to obstruct a former highway by erecting a gate thereon, it should appear that such construction is necessary to give a reasonable effect to the statute. In this case, no such necessity appears; but from the case as stated, it appears that the corporation might have exercised their right to erect a gate, and to receive the toll, as empowered by the statute, without impeding the travel on

the old highway. The statute authorizes the corporation to erect a gate on the turnpike-road, near the dwelling-house of Joseph Hunt, and it is agreed in the case that a gate might have been erected on the turnpike, and near the dwelling-house of J. Hunt, and not upon any part of the old highway. This gate, being on the old highway, is a public nuisance, and the defendant has a right to abate it. Let the plaintiff be called.

PAGE v. TRUFANT.

[2 MASS. 159.]

CONTRACT WHEN VALID.—A bond given by the husband to the father of his wife, for her maintenance, after a voluntary separation, is a valid contract, and an action can be maintained thereon.

DEBT on a bond for one hundred and twenty pounds, conditioned to pay fifty-eight pounds ten shillings, by certain installments. The defendant pleaded: 1. *Non est factum*; 2. *Actio non*, because the bond was given in consideration of a void and nugatory agreement; to wit, an agreement between Colson Trufant and his wife, Maria, the daughter of the plaintiff, that they should live apart, on account of jealousies existing between them, and that in consideration of a bond for sixty pounds, executed by the husband, the wife should support their daughter, release the husband from all claims, and should not contract debts on his account; 3. *Actio non*, because at the time of executing the bond declared on, it was agreed between the plaintiff and defendant, that plaintiff should enter into a covenant with defendant to save him harmless from all claims of the wife and from all debts of her contracting, and to maintain her for fifty years; that the plaintiff has refused to enter into such covenant. To the pleas in bar the plaintiff demurred.

Dana, for the defendant, contended that the consideration of a bond might be inquired into; and that this bond, being founded on a void agreement, could not be supported. Doctor and Student, 158; *Collins v. Blantern*, 2 Wils. 347; *Davis v. Mason*, 5 T. R. 118; *Chesman v. Nainby*, 2 Str. 739; 2 P. Wms. 254.

Bigelow, in support of the demurrers, contended that the pleas were inconsistent, informal, argumentative, and void. *Meredith v. Chute*, 2 Lord Raym. 759; *Impey's Modern Pleader*, 162; *Mease v. Mease*, Cowp. 47.

PARKER, J. The question brought before the court by the pleadings in this case is, whether the consideration of this bond is traversable. A mere voluntary bond, given without any consideration, is good. Bonds obtained by duress, given during infancy, and in certain other specified cases, as, for instance, in restraint of trade, are void in law. These cases are all stated and described in the books. The case before the court comes within none of them. Perhaps a court of chancery might compel the plaintiff to execute the covenant which it is stated he engaged to execute, but we possess no such power. The pleas appear to me insufficient to bar the plaintiff of his action.

SEWALL, J. The amount of the defendant's pleas is, that the wife not being bound by her covenants in the articles of separation, and no covenants having been made by the plaintiff pursuant to his engagement, there was therefore no consideration for this bond. But a mere want of consideration is not sufficient to avoid a bond, although an illegal consideration is. Perhaps a court of equity might afford some relief in such a case, but this court have no powers to that purpose. As to the legal operation of this bond, it appears to me to be valid, and must be supported; and I am consequently of opinion that the pleas in bar are insufficient.

SEDGWICK, J. This bond is stated in the defendant's pleas, to be given for securing the separate maintenance of a wife. There are demurrers to these pleas, by which all the facts well pleaded the court must consider to be true. The question, then, brought before the court is, whether the consideration for which this bond was given is sufficient to support an action upon it. Every bond, from the solemnity of the instrument, carries with it an internal evidence of a good consideration, 2 Bl. Com. 446, and is to be supported in a court of law, except facts are disclosed to the court whereby the consideration appears to be immoral, illegal, or against the policy of the law. These pleadings show neither. Separate maintenance is lawful, and a bond given to secure it to a wife is meritorious, and therefore valid and binding. The defendant's pleas are insufficient.

PARSONS, C. J. A bond, from the solemnity of its execution, imports a consideration, the want of which the obligor is estopped by law to plead. He may avoid the bond by showing that it was obtained by fraud or duress, or that the consideration is illegal or against the policy of the law. In the first plea

in bar it is alleged that the bond was given for a separate maintenance of the wife on mutual stipulations between the husband and wife, which stipulations, on her part, were void. In the second plea it is alleged that the bond was given on mutual promises between the parties, and that the plaintiff hath not performed the promises on his part to be performed. In both these pleas the objection to the bond is substantially the same, viz., a want of consideration which cannot prevail. It in fact appears upon the record that the consideration was legal and meritorious, as it was made to secure a separate maintenance for the wife, who separated from her husband for their mutual comfort, to avoid the effect of jealousies and animosities that existed between them.

The judgment of the court is, that the pleas in bar are bad and insufficient in law.

This case was cited and approved in *Fox v. Davis*, 113 Mass. 255.

PERNAM *v.* WEAD.

[2 Mass. 203.]

RIGHT OF WAY OVER ANOTHER'S LAND.—Where a judgment creditor levied on a part of the debtor's land, leaving the latter no passage from the remaining portion to the highway, the debtor has necessarily a right of way over the land levied upon.

TRESPASS on the case, for disturbing plaintiff in the enjoyment of an easement. The facts, as agreed upon by the parties, were: On the thirteenth of March, 1789, plaintiff was seised in fee of a lot of land, with a dwelling-house thereon, bounded on one side by a street or public highway; that being so seised, one Sawyer caused an execution, which he held against plaintiff, to be levied on that part of the land adjoining the street, and that the defendant now has all the right and title of Sawyer by virtue of such levy; that plaintiff is still seised of the residue of the lot on which the dwelling-house stands, and has no way from his dwelling-house to the public highway and back but through the premises taken on execution, without trespassing upon the lands of others; that the defendant has obstructed plaintiff's way over and through the premises, by erecting fences, the one in front, the other in the rear thereof.

It was further agreed that if, upon these facts, the court should be of opinion that the plaintiff has a right of way by

necessity from his dwelling-house to the public highway over the premises taken on execution, by the mere operation of law, then judgment should be for the plaintiff; if otherwise, judgment should be for the defendant.

Putnam and Andrews, for the plaintiff, contended that the right of way was one of necessity, reserved unto him by the operation of law; and cited *Clark v. Cogge*, Cro. Jac. 170; *Howton v. Frearson*, 8 T. R. 50; 2 Sid. 39, 111, 112; Bro. Abr. tit. Extinguishment, pl. 15; Lutw. 1448; Popham, 167; Palmer, 446; 6 Mod. 3, 4.

Little, for the defendant, contended that it would be an injustice to the creditor to allow this claim of the debtor; that the land was sold under the execution without notice of the incumbrance, for which a deduction would have been made had it been known to the creditor. By statute February 27, 1787, plaintiff could have, on application to the selectmen of the town, and paying a suitable recompense, a way laid out for his use; and if the common law right of way still existed, this act was nugatory. Moreover, a way of necessity derives its origin from a grant; in this case there is no pretense of a grant: 1 Saund. 323 a, Williams's note, 6.

PARKER, J. The plaintiff has brought his action for an interruption in a way from his dwelling-house and curtilage to some public highway. It is agreed that he had no way by which he could have communication with the world, unless over this land, or by trespassing on others. The question, on this state of the case, is whether the law gives him a way as a way of necessity. I am of opinion that it does. The reason of the thing is plain, and the cases cited are clearly in point. If when a man voluntarily, for valuable consideration, grants land, having other land in the rear, he be entitled to this way of necessity, although he might have secured it by reservation in his grant; surely, when his land is taken from him without his consent, by force of law, he is not less entitled to such a privilege; more especially when it is considered that the judgment creditor may elect where to take his land in satisfaction of his execution. He might have taken the land in the rear with the house, or he might have left a passage-way for the debtor, and had more land set-off to him in lieu of that so left. He, therefore, must be considered as having chosen to take the whole front of the debtor's land, knowing at the time that he shut him from all communication with the private or public ways in the town. Under these cir-

cumstances, he certainly ought not to be privileged beyond a man who has made a fair purchase, dealing upon equal terms with a grantor.

The only objection made on the part of the defendant arises from the provisions of the statute by which the plaintiff might have procured a way to be laid out by the selectmen. But I cannot consider this statute as divesting a common-law right, unless it were specially so declared by the words of the statute. I am satisfied that the plaintiff has been legally entitled to a way of necessity from the time the execution was extended.

SEWALL and SEDGWICK, JJ., concurred.

COGSWELL v. DOLLIVER.

[2 MASS. 217.]

BOOKS OF ACCOUNT AS EVIDENCE.—Shop books verified by the oath of the party, though not kept regularly in the manner of a day-book, may be given in evidence to the jury, who are to judge of their credit.

ACCOUNT WHEN NOT BARRED BY STATUTE OF LIMITATIONS.—If any items of an account are within six years, they will also take with them such items as are beyond six years, so as to prevent the bar of the statute of limitations.

ERROR from the court of common pleas. The original action was *indebitatus assumpsit* for goods sold and delivered, brought by the present plaintiff in error. The defendant filed his account against plaintiff as a set-off, and pleaded the general issue; and verdict was found for defendant for the excess of his account beyond the plaintiffs. A bill of exceptions was thereupon filed, and the following errors assigned: 1. That the court allowed defendant to give in evidence, to prove his set-off, two memorandum books, not kept in the form of day or waste books, wherein were entered the items of account charged against plaintiff intermixed with notes, receipts, etc., relating to defendant's dealings with other persons, without regard to dates or pages; and that the entries were but loose memoranda which might have been made at one time as another, and did not of themselves contain any evidence of having been made at their respective dates; 2. That although plaintiff objected that so much of the account filed as was more than six years old was barred by the statute of limitations, yet the court charged the jury that the account attached to the writ and the account filed might be considered as mutual accounts between merchants,

and so not barred by the statute of limitations; 3. The general error. Defendant pleaded *in nullo est erratum*. Upon notice to produce, the memorandum books were handed to the court for inspection.

Andrews, for the defendant in error, in support of the judgment, contended that there was no error in admitting the books, as the credit to be given them had been left to the jury; that the two accounts were of themselves proof of the existence of mutual demands, and that *Calling v. Skoulding*, 6 T. R. 189, was decisive of this point.

Putnam, for the plaintiff in error, contended that the admission of these books as evidence would open a door to frauds and perjuries, and place books evidently fair on the same footing with those fabricated for a particular purpose. The items, with one exception, were barred by the statute; if the defendant had brought an action against plaintiff upon the account filed, the statute would be pleadable in bar to those items more than six years old; Esp. Dig. 149, and defendant could not avoid the statute in the manner attempted.

PARKER, J. As to the first error assigned in this cause, it seems to be rather a question of fact than of law. This mode of proof is peculiar to our country, and probably has been in practice from its first settlement. The jury are the proper and adequate judges of the weight of this, as of all other evidence laid before them, and I think the court below did right in referring it to them. As to the second error assigned, it appears that here were mutual accounts, and one or more items on each side within six years, which took the whole accounts out of the statute.

SEWALL, J. In actions of *assumpsit* for goods sold and delivered, evidence by a shop book, or other daily memoranda, with the supplementary oath of the party himself, if living, is a mode of proof admitted with us generally, and is made necessary by the course of business in transactions of that nature. Books offered as evidence may be rejected by the court as incompetent, or, when admitted, may be treated as unworthy of credit. I recollect but two sorts of objections which have been allowed against books, as rendering them incompetent evidence. To be admitted in evidence, they must appear to contain the first entries or charges by the party, made at, or near the time of the transaction to be proved; and when the contrary is discoverable upon the face of the book, or comes

out upon the examination of the party, they ought to be rejected as incompetent evidence. Fraudulent appearances or circumstances, such as material and gross alterations, false additions, etc., are also objections to the competency of the book in which they are discoverable, or against which they may be proved in any manner.

Objections to the credit of books admitted in evidence are of various kinds, which there is no occasion to enumerate. The method in which the book has been kept—as when the charges to be proved have been entered to a particular account, like the entries of a ledger, and not like those of a day-book, is an objection to the credit of the book. The one method leaves a greater opening to fraud and falsehood than the other. The book excepted to in this case was liable to objections of the latter kind, applicable to the credit of the entries to be proved by it, but not to the competency of the book itself. It was, therefore, properly admitted in evidence to the jury, and might, with the supplementary oath of the party, be satisfactory proof to them, notwithstanding the objections to which these entries appear to be liable.

The other exception has, I think, been satisfactorily answered by the authority, *Callin v. Skoulding*, 6 T. R. 189, which has been read. It was not, perhaps, correct to consider the accounts disputed between these parties as excepted from the statute of limitations in the name of mutual accounts between merchant and merchant. But the direction of the court upon this part of the case was, in effect, substantially just. It was proper the jury should take both accounts into consideration, there being on each side changes within the six years. This circumstance was evidence of a renewed promise applicable to the whole account. There being evidence of subsisting accounts between the parties, every new additional charge by one party revives the account of the other party, and is evidence from which the law implies a promise of adjustment, and for the payment of the balance as it shall appear; and this evidence was suitably referred to the jury. I see no error in the record before us, and the judgment ought to be affirmed.

SEDGWICK, J. It is to be lamented that it is necessary, in this country, to resort to evidence of this kind, as it opens a door, and furnishes a temptation to much mischief. Where a book is offered in evidence, it ought to appear suited to aid the oath of the party, which it is brought to fortify and confirm. The court are to judge of its competency to be admitted in evidence, and the jury are to decide on the credit which may be

due to it. When this book was exhibited to the court below, they considered it as suitable to go to the jury, and they so adjudged. To suffer our inquiries to go behind that decision would be throwing things into too loose a state. I think the evidence was properly left to the jury.

The true ground of admitting the books of the party in evidence, as a foundation for the suppletory evidence of the oath of the party, I have always understood to be, that the judge or court, before whom the case is tried, should, on inspection, determine that the book was proper for that purpose, and that such determination renders it competent evidence.

With regard to the second error assigned, the question was, whether these demands were barred by the statute of limitations. If any of the articles charged in an account were sold and delivered within six years preceding the commencement of the suit, they will draw after them the articles beyond six years, so as to exempt them from the operation of the statute. Although the court of common pleas were mistaken in the reason of their direction as to this point, yet the direction was substantially right.

Judgment affirmed.

The authority of *Catling v. Skoulding*, 6 T. R. 189, was fully recognized in this case. This is a leading case. It was there held that if there be a mutual account of any sort between the plaintiff and the defendant, for any item for which credit has been given within six years, that is evidence of an acknowledgment of there being such an open account between the parties, and of a promise to pay the balance so as to take the case out of the statute of limitations. The main current of American decisions is still in accordance with *Catling v. Skoulding*: *Kimball v. Brown*, 7 Wend. 322; *Chamberlain v. Cuyler*, 9 Id. 126; *Davis v. Smith*, 4 Greenl. 337; *Union Bank v. Knapp*, 3 Pick. 96, following principal case; *Spring v. Gray*, 5 Mason, 527, citing principal case; *Penniman v. Rotch*, 3 Met. 221; *Chace v. Trafford*, 116 Mass. 529, also citing the principal case; *Todd v. Todd*, 15 Ala. 743; *Wilson v. Calvert*, 18 Id. 274; *Abbott v. Keith*, 11 Vt. 529; *Hodge v. Manly*, 25 Id. 210. But the doctrine is denied in *Blair v. Drew*, 6 N. H. 235, where Parker, J., gives an elaborate examination of the authorities; *Livermore v. Rand*, 6 Foster, 85; *Lansdale v. Brashear*, 3 T. B. Mon. 330; *Smith v. Dawson*, 10 B. Mon. 112; *Craighead v. Bank*, 7 Yerg. 399. See further, Angell on Limitations, pp. 129, 130, where the leading cases are referred to.

In regard to the admission of the books of a party as evidence, Greenl. 1 Evid., sec. 118, says: "In the United States this principle has been carried further, and extended to entries made by the party himself, in his own shop books. Though this evidence has sometimes been said to be admitted contrary to the rules of common law, yet in general its admission will be found in perfect harmony with those rules, the entry being admitted only where it was evidently contemporaneous with the fact and part of the *res gestæ*. Being the act of the party himself, it is received with greater caution; but still it may be seen and weighed by the jury."

ELLIS v. MARSHALL.

[2 MASS. 209.]

ASSENT TO AN ACT OF INCORPORATION.—Where an act of the legislature incorporated certain persons named, for the purpose of making a street, and subjected them [to assessment by the corporation for the expenses of making such street, it was held that a person named in the act could not be bound unless he had assented thereto.

EJECTMENT. The plaintiff claimed under a sale by the “Front Street Corporation in the town of Boston.” By the act of March 6, 1804, establishing this corporation, sundry persons, and among them the defendant Marshall, described as “being owners and proprietors of the lands and flats over which the said street will pass, and of the lands and flats adjoining thereto,” were incorporated for the purpose of making a street in the town of Boston, and were authorized to levy such assessments upon the owners and proprietors of said lands as should be agreed upon by them at a meeting called for the purpose; in case of the refusal or neglect of any owner to pay the assessment, the proprietors were authorized to sell so much of the delinquent’s land as would satisfy the assessment and charges, and give a good and valid deed thereof to the purchaser in fee-simple.

It appeared that this act was passed in consequence of a petition to the general court, of the major part of the owners of the land over which the street was to be built, but that Marshall, who was one of the owners, did not subscribe the petition; that the petition was referred by the general court to a committee to hear all persons interested, after giving public notice, and that the committee reported favorably upon the petition; but Marshall did not appear before them, nor gave any assent to the petition, or to the passage of the act; that Marshall’s land adjoins the street, and is benefited thereby in the same proportion with other property-holders adjoining the street; that after the street was begun to be built, and before it was finished, Marshall was requested, and refused, to enter into a covenant with the other proprietors, whereby they mutually agreed not to erect any building within ten feet of the western side of the street, but signed a separate instrument for that purpose, which contained a provision that he should not thereby be bound to pay any part of the expense of making the road, and that the legal rights and remedies of all the parties should be the same as if the instrument had not been made;

that Marshall having refused to pay the assessment levied upon him according to the act, the land in question was sold at auction, and a deed in fee thereof given to the purchaser Ellis.

It was agreed that if the court should be of opinion that the corporation could, by virtue of the act, legally assess Marshall, and sell his lands for non-payment, then judgment should be for the plaintiff; otherwise, for the defendant.

Attorney-general Sullivan and Amory, for the defendant, contended that an incorporation being a grant of privileges, the assent of the grantee, either express or implied is necessary to give it effect; that in this case there was nothing from which Marshall's consent could be inferred. The fact that he did not appear before the committee, affords no presumption of assent, because from the petition defendant might well have supposed that it was intended to pass a law for the appropriation of private property for public use for which a compensation would be paid. Since the passage of the act, defendant has repeatedly manifested his dissent. Moreover, this act is a violation of the constitutional provision for the protection of individuals in the enjoyment of life, liberty and property, according to the standing laws.

Dexter, for the plaintiff, contended that Marshall must have had knowledge of the object of the petition, and having made no opposition, is presumed to have assented; since the passage of the act, he has acknowledged the existence of the corporation, and ought not to be permitted to question the legality of the provisions of the act by which it was created.

The article of the constitution relied on by defendant, was intended to restrain the legislature from injuring the citizen, not from benefiting him, as is the case here.

By Court, PARKER, J. From the foregoing facts, and the arguments thereon by the counsel, it appears that all the proceedings of the corporation relative to the assessment and sale were correct; so that if Marshall were, at the time thereof, a member of the corporation, the title to the demanded premises in Ellis could not be disputed. We are therefore necessarily brought to the question, indeed the only one in the case, whether Marshall, by virtue of the aforesaid, became a member of the said corporation, subject to its rules and regulations, and liable to be assessed for the purpose of building said street. The counsel for the plaintiff have contended:

1. That by virtue of the act itself, Marshall being named

therein, he became, *ipso facto*, a member of the corporation, the legislature having competent power to compel him thereto;

2. That should this not be the case, the foregoing facts contain sufficient evidence of his consent, tacit, at least, to the passing of said act, and the insertion of his name therein.

The determination of the first point requires that we should ascertain the true nature and character of this legislative proceeding. If it were a public act, predicated upon a view to the general good, the question would be more difficult. If it be a private act, obtained at the solicitations of individuals, for their private emolument, or for the improvement of their estates, it must be construed, as to its effect and operation, like a grant. We are all of opinion that this was a grant or charter to the individuals who prayed for it, and those who should associate with them; and all incorporations to make turnpikes, canals, and bridges, must be so considered.

Can then one, whose name is by mistake or misrepresentation inserted in such an act, refuse the privileges it confers, and avoid the burden it imposes? If he cannot, then the legislature may at all times press into the service of such corporations those whose lands may be wanted for such objects whenever they may be prevailed on to insert the names of such persons by the intrigue or mistake of those more interested in the success of the object. No apprehension exists in the community that the legislature has such power. That the land of any person, over or through which a turnpike or canal may pass, may be taken for that purpose, if the legislature deem it proper, is not doubted. The constitution gives power to do this, provided compensation is made. But it was never before known that they have power over the person to make him a member of a corporation, and subject him to taxation, *nolens volens*, for the promotion of a private enterprise.

That a man may refuse a grant, whether from the government or an individual, seems to be a principle too clear to require the support of authorities. That he may decline to improve his land no one will doubt. Although the legislature may wisely determine that a certain use of his property will be highly beneficial to him, he has a right to judge for himself on points of this nature. The fact, therefore, in the case that Marshall is benefited equally with the other owners by the making of this street, is of no importance. In *Bagg's case*, Rolle's Rep. 224, it seems to be agreed by the court that a patent procured by some persons of a corporation shall not bind the rest, unless they as-

sent. And in Brownlow's Reports, 100, there is this passage: "It was said that inhabitants of a town cannot be incorporated without the consent of the major part of them, and an incorporation without their consent is void."

In Comberbach, 316, Holt, speaking of a new charter made to the city of Norwich by Henry IV, and confirmed by Charles II, says: "The new charter had been void if the corporation had refused it, but when they accepted it and put it in execution, it is good." If these principles were correct in England, in times when prerogative ran high—and the crown or the parliament could not force charters or patents upon the subject without his assent, surely in this free country, where the legislature derives its power from the people, such authority cannot be contended for. It being, then, the opinion of the court that this act is of a nature to require the assent of Marshall, either express or implied, before it can operate upon him, it is necessary to inquire into the second point, viz., whether the facts agreed on this case furnish evidence of such assent.

It is contended that the act itself, as it contains Marshall's name, furnishes such evidence, since it must be presumed that the legislature were satisfied on this point before they passed the act. This argument would have great weight if its force were not impaired by the facts stated in this case. It appearing that Marshall did not sign the petition; that he did not, in word or writing, assent to it, or to the act founded upon it; that he did not attend before the committee; and that, in the only transaction in which he noticed the corporation, he protested against its authority over him, the presumption arising from his name being in the act is weakened, if not destroyed.

It is then said that, public notice having been given of the hearing intended by the committee, his silence is evidence of his tacit assent to the passage of the act. As we are bound to presume everything in favor of the doings of the legislature, we should think this a strong, if not a conclusive argument, if the notice given had been such as necessarily to signify to Marshall that he was to be included in the act prayed for. But on perusing the petition, which probably was published in the papers, we find nothing in it from which he could infer that his property or rights were to be affected in the manner contemplated by this act. He may be considered as notified that a street was intended to be built over his ground; and all that he could infer from this was, that so much of his land as the street would pass

over would be taken for this purpose, and that he would receive an indemnity for it in the usual way; and that any opposition to it would be unavailing. He certainly could never have understood that it was intended to make him a member of the corporation without his consent. There is, therefore, no evidence even of a tacit consent before the passing of the act; and his conduct after it passed amounts to a direct disavowal of all the doings of the corporation, as they respected him or his property.

Upon the whole, therefore, we are of opinion that the act under which the plaintiff sets up his title, could not bind Marshall without his assent; that he having uniformly, whenever opportunity occurred, signified his dissent, is not a member of the corporation it created, was not liable to their assessments, and, therefore, that the sale of his land was without authority of law, and is void. According to the agreement of the parties, therefore, the plaintiff must become nonsuit, and judgment be given for costs to the defendant.

It having been said in argument, that the acts relative to fencing common fields, and the acts providing for the appointment of commissioners of common sewers, are within the principle of this act, it is proper to observe that we do not consider this decision as involving principles which militate with the provisions of those acts. Those are public acts, promotive of general convenience, and operating equally upon all citizens whose property is intended to be secured or improved by them. This is a private act, obtained at the solicitation of individuals, for their emolument or advantage.

The act relative to common fields also is predicated upon the assent of all who are to be affected by it; and that which provides for the appointment of commissioners of sewers gives an eventual trial by jury of all questions arising under it. These circumstances so materially vary those laws from the act under consideration, that our decisions upon the latter can by no common means be considered as questioning the validity of the former. These observations are made to prevent any opinion prejudicial to the authority of those laws from an apprehension that as, in the argument, they have been considered analogous to the one on which we have now determined, an unnecessary alarm respecting them may spread in the community.

Plaintiff nonsuited.

This is the language of Kent citing this case, 2 Com. 277: "It requires the acceptance of the charter to create a corporate body; for the govern-

ment cannot compel persons to become an incorporated body without their consent, or the consent of at least the major part of them." See on this point: Field on Corporations, p. 35; Angell & Ames on Corporations, sec. 81, 86. The case is cited and its authority indorsed in *Lexington v. West Cambridge R. R. Co.*, 13 Met. 315; *Wright v. Tubey*, 3 Cush. 297; *Dartmouth College v. Woodward*, 4 Wheat. 708.

COMMONWEALTH v. JUDD.

[2 Mass. 329.]

CONSPIRACY.—A conspiracy to manufacture base and spurious indigo, with a fraudulent intent to sell the same as good and genuine indigo, is an indictable offense, although no sale be made in pursuance of such conspiracy.

INDICTMENT for conspiring to mix, compound and manufacture a certain base material in the form and color and of the resemblance to good and genuine indigo of the best quality of foreign growth, with intent to sell the same at auction as and for good and genuine indigo, etc. The indictment further charged that, in pursuance of such conspiracy, defendants did manufacture a certain base material so as to have the appearance of genuine indigo, and exposed the same for sale at public auction with intent to defraud the purchaser, and did sell the same as and for genuine indigo.

Upon the plea of not guilty, the jury found the defendants guilty of a conspiracy to make base and spurious indigo, with a fraudulent intent to sell the same as good and genuine indigo, but did not find that the same was sold at auction in the manner set forth in the indictment.

Otis, on behalf of the defendants, moved in arrest of judgment: 1. Because the verdict does not find them guilty of any offense charged in the indictment; and, 2. If the verdict had found them guilty of the first count in the indictment, that count does not contain a charge of an indictable offense.

Davis, solicitor-general, contended that should the verdict be defective, a *venire facias de novo* might issue: 2 Hawk. P. C. c. 47, sec. 9; *Ld. Raym.* 1521, but urged that the verdict was good; that a bare conspiracy to do a lawful act to an unlawful end is criminal, though no act be done in consequence thereof: *Rex v. Edwards et al.*, 8 Mod. 321; *Queen v. Bass*, 11 Mod. 55. The gist of the offense is the unlawful conspiring: *Rex v. Ris-pal*, 3 Burr. 1320; *Rex v. Sterling et al.*, 1 Lev. 125; *Child v.*

North et al., 1 Keble, 203; *Rex v. Armstrong et al.*, 1 Vent. 304; *Regina v. Best et al.*, 1 Salk. 174; *Rex v. The Journeymen Tailors of Cambridge*, 8 Mod. 8; *Rex v. Kinnersley et al.*, 1 Str. 193. If the addition of the words "in manner and form as set forth in the indictment" after the word "indigo" in the verdict would make it more certain, the court have the power to make the amendment.

By Court, PARSONS, C. J. The defendants have been indicted for conspiring together to manufacture certain materials mentioned in the indictment, of which one was good indigo of foreign growth, a base composition resembling genuine indigo of the best quality and of foreign growth, with a fraudulent intention that the same should be exposed to sale, and sold at public auction as genuine indigo of the best quality and of foreign growth. The indictment further charges that, in pursuance of this conspiracy, they in fact manufactured this base composition; and that in further pursuance of this confederacy, they exposed this base composition for sale at public auction, and in fact sold it for genuine indigo of the best quality and of foreign growth.

Upon this indictment, the defendants have been tried, and the jury have returned their verdict that the defendant were "guilty of a conspiracy to make base and spurious indigo, with a fraudulent intent to sell the same as good and genuine indigo; but they do not find that the same was sold at auction, in the manner set forth in the indictment."

The defendants now move in arrest of judgment: 1. Because the verdict has not found them guilty of any offense charged in the indictment; and, 2. If the verdict had found them guilty of the first count in the indictment, that count doth not contain a charge of an indictable offense. It is necessary, first, to decide what facts are found in the verdict. The counsel for the government contends that after the words "genuine indigo" ought to be inserted the words "in manner and form as is set forth in the indictment." This is opposed by the counsel for the defendants, who contends that no such amendment ought to be made. We are all of opinion that this amendment be made; that the words are merely technical, and when omitted ought to be supplied. As the jury cannot inquire into the truth of any facts but those which are comprised in the issue, it must necessarily be intended that whatever facts they find are according to the allegations of the indictment, unless a different intention can be inferred from the verdict. In this

case, no such different intention can be inferred; but the general intent of finding according to indictment is supported by the addition, by the jury, of these technical words of reference at the close of the verdict.

The verdict being thus amended by inserting the usual words of reference, the counsel for the commonwealth insists that it amounts to a general verdict of guilty as to the first count in the indictment. To this the counsel for the defendants has made two objections. The first is, that the first count charges the defendants with a conspiracy to manufacture a base composition resembling indigo; the verdict finds them guilty of making base and spurious indigo. As the first count alleges that the materials of the base composition are the same as are after-mentioned in the indictment, and among which good and genuine indigo of foreign growth is an ingredient composing one-third of the whole mass, we are satisfied that there is no material variance in the verdict from the first count. A base composition intended to resemble genuine indigo, and one-third of which composition was genuine indigo, is very clearly a mass of base and spurious indigo; it is indigo debased and adulterated. The second exception is, that the first count alleges that the intent was to make a fraudulent sale of the base composition at public auction, as and for genuine indigo of the best quality and of foreign growth; but the verdict only finds a fraudulent intention of selling it. This exception, we are of opinion, would have been fatal, if we had not been obliged to admit the verdict to be amended by inserting the technical reference to the indictment. Now, we are satisfied that the finding of the jury comprises not only the intention to sell, but to sell in the manner, for the purposes and as and for the material alleged in the first count.

Several exceptions have also been taken to the first count as insufficient to support a judgment thereon against the defendants. It is objected that there is no allegation that the defendants intended to affirm, at the sale, that the base composition was genuine indigo. The indictment alleges that the intent was to sell it as genuine indigo, which, in our opinion, is a sufficient allegation, and the constant usage, in cases like this in principle, supports our opinion. Another objection is that there is no allegation in the indictment that the base composition was not as useful and beneficial to the purchaser, for every purpose, as genuine indigo; and then the fraudulent intention alleged could not have been committed, as no injury would have been

done the purchaser. But the indictment states that the intent was to deceive the purchaser by concealing from him the nature and quality of the commodity he bought, by selling it as a different commodity, and that this intent was fraudulent; and so it certainly was, as every purchaser is entitled to open and fair dealing from the seller. It may also be observed that if the defendants were skilled in a manufacture of a commodity as useful as genuine indigo, by adding to such indigo other cheap ingredients, so as to treble the quantity, the selling the whole mass as one of the raw materials, is undoubtedly a fraud on the purchaser.

It is also objected that there is no allegation in the indictment, that the intent was to defraud the citizens of the commonwealth, or to sell the base composition within the state; and it was insisted that any act done within the state, not prohibited by law, with an intent to practice a fraud without the state, on the citizens or subjects of other governments, was not an indictable offense. Without giving any opinion as to the correctness of this position, and without observing whether, if the intent had been to sell the base composition without the state, it should not have been shown to the jury by the defendants, it is sufficient here to notice that the indictment alleges that the conspiracy was made, and the fraudulent sale designed with the intent of acquiring the moneys, goods, and chattels of the citizens of this commonwealth by fraudulent and dishonest means.

The last and principal objection is, that the first count charges a conspiracy to do an act not prohibited by law, with an unlawful intent to defraud, not any individual by name, but whoever might be the purchasers, without giving any description of them as consisting of certain people, or of a certain class of people, and no act done in pursuance of this conspiracy is either alleged in the first count, or found by the verdict. And it is insisted that this is not an indictable offense.

Certainly, as no act is alleged in the first count to be done in pursuance of the conspiracy, and as the jury are silent as to the second count, and negative the third count, the court must consider the defendants as acquitted of all the indictment, but the first count. The question is, therefore, whether the conspiracy as alleged in the first count, no act being alleged as done in pursuance of it, is an indictable offense. After fully considering the several cases, the court are satisfied that the gist of a conspiracy is the unlawful confederacy to do an unlaw-

ful act, or even a lawful act for unlawful purposes; that the offense is complete when the confederacy is made, and any act done in pursuance of it is no constituent part of the offense, but merely an aggravation of it. This rule of the common law is to prevent unlawful combinations. A solitary offender may be easily detected and punished; but combinations against law are always dangerous to the public peace and to private security. To guard against the union of numbers to effect an unlawful design is not easy, and to detect and punish them is often difficult. The unlawful confederacy is therefore punished, to prevent the doing of any act in execution of it. Of this principle the adjudged cases leave no doubt.

That a conspiracy to do a lawful act for an unlawful purpose is an offense, was determined in the cases of *The King v. Edwards et al.*, 8 Mod. 820; *The King v. The Journeymen Tailors of Cambridge*, Id. 11; and *The King v. Robinson*, 1 Leach, C. C. 47.

In the argument by the counsel for the defendants, he admitted that a conspiracy to do a lawful act, with the unlawful intent of injuring an individual, was an indictable offense, although no act was done in pursuance of it; but he insisted that the law was different when the intent was to injure a number of people not described, and that in such case an act done in pursuance of the conspiracy must be alleged and found, as a necessary means to designate the persons intended to be injured. We are not satisfied that the law makes this distinction; it certainly does not in the case of knowingly having in possession forged bank-notes or counterfeit current coin, with the intent to pass them as genuine; for it is not necessary to allege, in these cases, an act done in pursuance of the intent. The intent is to cheat whoever can be cheated. In the case at bar, there was the same general intent to defraud all who could be defrauded. We therefore think the offense to be greatly aggravated by the undistinguishing mischief that was designed. If an authority was required on this plain principle, we think the case of *The Journeymen Tailors* is substantially in point. The object was to raise their wages, and the persons who were to be injured were, more immediately, any persons who might hire them, and perhaps, remotely, all their customers. Upon the whole, we are satisfied this objection ought not to prevail.

We have considered this record with a disposition to allow the defendants every advantage to which we could believe them entitled. There is a justice due to the commonwealth for the

protection of its citizens against fraud and deceit; and after an attentive examination of the motion in arrest of judgment, and of the arguments in support of it, it is the opinion of the court that judgment be not arrested, but that it be entered against the defendants on the first count of the indictment.

HOWE v. BASS.

[2 Mass. 380.]

MONUMENTS WHEN TO CONTROL.—Land was conveyed by a deed which described it as measuring forty-five feet, and bounded by certain known and visible monuments; but the distance between the monuments was sixty-five feet. It was held that the purchaser should hold according to the monuments, and not by the measure as described.

WRIT OF ENTRY to recover seisin and possession of certain land. The cause now came before the court on a motion for a new trial on the ground of misdirection of the jury. The following facts appeared in evidence. On the twenty-first of January, 1708, Robert Calef and wife conveyed to Israel Howe a tract of land in Boston, described as bounded forty-five feet on Orange street; on the tenth October following, Joseph Simpson and wife conveyed to Howe a tract of land adjoining that before mentioned, and being twenty feet on Orange street. Israel Howe died seised of both parcels, and from him they descended to Elizabeth Gilman, who becoming *non compos*, Joseph Howe, as her guardian, entered and took the profits until about the year 1775. On the fifth of June, 1778, Joseph Howe being duly authorized thereto, conveyed by deed to the defendant Bass a piece of land on Orange street, described as bounded on one side by the land of the heirs of Hannah Kent, and on the other side by land of the heirs of Joseph Veasie, and measuring forty-five feet. By the plan used in the case, the land bounded by the property of the heirs of Kent and Veasie measured sixty-five feet.

The demandants, who claimed as the heirs of Elizabeth Gilman, offered to show that the deed to Bass was intended to pass the land conveyed by Calef and wife to Howe. This the judge rejected, and directed the jury that, for the purpose of ascertaining the quantity of land conveyed, fixed monuments should govern, although the actual measurement did not agree with the extent stated in the deed. Verdict was given for the defendant for the tract containing sixty-five feet by actual measurement.

Amory and Otis, for the demandants, in support of their motion for a new trial, contended that they ought to have been permitted to introduce evidence to show that a tract other than that found by the jury, was intended to be conveyed; and endeavored to make a distinction between one selling under a naked authority and the owner of land.

Gray, for the defendant, was stopped by the court.

PARKER, J. Being satisfied with the opinion I gave on the trial, I see no reason for sending the cause again to a jury. There is no rule of construction more established than this, that where a deed describes land by its admeasurement, and at the same time, by known and visible monuments, these latter shall govern. And the rule is bottomed on the soundest reason. There may be mistakes in measuring land, but there can be none in monuments. When a party is about purchasing land, he naturally estimates its quantity, and of course its value, by the fences which inclose it, or by other fixed monuments which mark its boundaries, and he purchases accordingly.

The jury were therefore instructed by me that, as the land contained within the monuments mentioned in the deed in question was all which had belonged to Elizabeth Gilman, the ward of the grantor, the construction of that deed should be, that it conveyed all her land. There was a case lately determined in the supreme court of New York, in which this principle is recognized and settled: *Man v. Pearson*, 2 John. 37.

SEWALL, J. I take the general rule to be that deeds and other instruments in writing are to be construed by themselves, except only when they contain a latent ambiguity. In the deed in question there is nothing ambiguous. Where monuments and admeasurements are both mentioned in the description of land conveyed, the purchaser must hold by the boundaries given by the monuments. I have known this question frequently agitated, and it has uniformly been so settled. It would have been improper to have gone into the inquiry respecting the title-deed handed to the scrivener. The direction of the judge on the trial appears to me to have been proper in every instance, and I see no reason for granting another trial on the ground disclosed.

SEDGWICK, J. Two questions might have arisen in this cause, viz.: whether the guardian pursued the authority vested in him, and which of the descriptions of the land conveyed by his deed is to prevail. But the first of these questions having been pre-

vented by an agreement of the parties filed in the cause, by which we are to take it for granted that the authority was strictly pursued, the deed remains to be construed in the same manner as if it was a conveyance in the grantor's own right. In the construction of a deed we are never to go out of the deed itself, unless there be contained in it some latent ambiguity, or a reference to some extraneous circumstance. The only object of inquiry out of the deed in question is, what is Veasie's land? That being found, the deed must be construed by itself. It has been so long and invariably held in this country that in case of a variance in the description of land, between monuments and the length of lines, the former are to govern, that the rule cannot now be shaken; and from the application of this rule to the present case, it follows that the land conveyed by Howe to Bass, must adjoin the land of Veasie's heirs the whole length of one of its sides. I am therefore of opinion that the direction of the judge was right, and that there ought to be no new trial.

PARSONS, C. J., having been engaged as counsel in the cause, gave no opinion.

THATCHER, J., absent.

New trial refused.

See *Bradford v. Hill*, 1 Am. Dec. 546, and note thereto. The principal case is cited and its authority recognized in *Folger v. Mitchell*, 3 Pick. 402; *Long v. Merrill*, 24 Id. 162; *Curtis v. Francis*, 9 Cush. 438; *Phillips v. Bowers*, 7 Gray, 25; *Higley v. Bidwell*, 9 Conn. 452; and in *Higuera v. United State*, 5 Wall. 836.

MARSTON v. HOBBS.

[2 MASS. 433.]

ASSIGNMENT OF BREACHES IN COVENANT. — In actions of covenant, the general rule is, that breaches may be assigned by negating the words of the covenant; but when such general assignment does not amount to a breach, the breach must be specially assigned. Covenants that the grantor is seised, that he has a right to convey, are within this rule; but covenants for quiet enjoyment, and against incumbrances, are within the exception, as well as a covenant of warranty.

MEASURE OF DAMAGES. — Upon a breach of the covenant of seisin, the measure of damages is the consideration paid, and interest thereon.

ACTION for the breach of covenants in a deed from defendant to plaintiff, purporting to convey two hundred acres of land for

the consideration of one hundred and thirty-three dollars and thirty-three cents. The deed contained covenants of seisin, against incumbrances, right to convey and warranty. The breaches of these covenants were assigned by plaintiff, as follows: "Now the plaintiff in fact saith, that at the time of executing and delivering the said deed to the plaintiff, the said defendant was not lawfully seised in fee of the premises; that they were not free of all incumbrances; that he had not a good right to sell and convey the same to the said Marston, in manner aforesaid; and that he has not warranted the same to the said Marston against the lawful claims and demands of any person or persons whomsoever; and so the said Hobbs his covenants aforesaid hath not kept and performed, but altogether hath broken the same."

Issues of fact were joined, upon which the question was, whether the defendant was seised of the premises in fee-simple at the time he executed the deed declared on.

At the trial plaintiff did not produce the defendant's deed, THATCHER, J., before whom the issues were tried, being of opinion that it was not necessary; nor was any ouster or adverse claim proved.

The defendant stated that he derived title by virtue of a sale of the premises for non-payment of taxes, and offered to read the constable's deed thereof to defendant. This evidence was rejected, on the ground that defendant should have shown that the constable, Weare Drake, was duly authorized to make the conveyance.

In his charge, the judge directed the jury that the measure of damages was the present value of the land, but that damages could not be given beyond the sum of six hundred dollars laid in the declaration. The jury found for the plaintiff and assessed damages at six hundred dollars. Thereupon, defendant filed exceptions, based upon the rejection of the constable's deed, and misdirection as to the measure of damages. The exceptions were argued by—

Emery, for the defendant.

Mellen, for the plaintiff.

By Court, PARSONS, C. J. As actions to recover damages for the breaches of covenants contained in deeds of conveyance of land are very frequent in this part of the country; and, as the principles on which such actions are to be maintained seem not to be generally understood, it may be expedient to consider the

subject more at large than perhaps is necessary for determining the validity of the exceptions filed in this case. The manner of assigning breaches of these covenants deserves some attention. The general rule is, that the plaintiff may assign the breaches generally by negating the words of the covenant. The exception to the rule is, that when such general assignment does not necessarily amount to a breach, the breach must be specially assigned. The first and third covenants in this case come within the rule. If the defendant was not seised, or if he had no right to convey, these covenants must necessarily be broken. They are called synonymous, because the same fact, the seisin of the defendant, which will support the first will also support the other covenant. The defendant, in his bar, should regularly maintain his seisin; and then the plaintiff in his replication, should aver who in fact was seised. The second covenant, against incumbrances, and also a covenant for quiet enjoyment, usually contained in deeds of conveyance, although not in this deed, come within the exception. For the defendant does not covenant against all interruptions of the plaintiff's possession, nor against all possible incumbrances. To these covenants the breaches should be specially assigned, showing the nature of the incumbrance and interruption complained of. No express case has been produced as to covenants against incumbrances; but in principle they are analogous to covenants for quiet enjoyment and in the entries, the incumbrance is especially alleged in the count. The last covenant of general warranty may deserve a more particular consideration. At common law, a warranty is a foundation of a voucher by the tenant when impleaded, and if he lost the land, he might have judgment to recover of the warrantor other lands of equal value. Or, when he could not vouch, or feared to be impleaded, he might, while tenant of the land, sue a real action on a writ of warranty of charters, in which he might have judgment to recover his warranty, which would bind the lands of the warrantor from the date of the writ. But the demandant could not have execution for other lands in value until he had lost his lands. And, if they were lost in an assize, or on a writ of entry, in which damages were recovered against him, he might also have execution for other lands in value, and for damages. Also, at common law, the tenant, after he had lost his land, might bring a personal action of covenant, on the covenant to warrant and defend, and recover a satisfaction in damages; but he must assign, as a breach of the covenant, an ouster by a title paramount.

The two former methods of recovering a recompense in value have never been practiced in this state; but the immemorial usage has been to recover damages in a personal action of covenant on the warranty. As the defendant is not bound by his general warranty to warrant against all claims and ousters, this covenant comes within the exception; and the plaintiff must assign a breach by showing an ouster by an elder title. In the present action the breaches of the second and fourth covenants are not well assigned, no incumbrance or ouster being alleged. For if these breaches had been well assigned, there would have been a material defect in the pleas, because they do not cover all the breaches. The defendant, at the execution of the deed, might in fact have been seised, and might have had a good right to convey, and yet there might have been incumbrances, against which he had engaged to indemnify the plaintiff, and there might have been a subsequent ouster by an older title.

Our next consideration has been on the nature of the evidence necessary to maintain the issues in this case. The pleadings have admitted the conveyance and covenants declared on, it was not necessary for the plaintiff to produce the deed to maintain the issues on his part. We are, therefore, satisfied with the opinion of the judge in ruling that it was not necessary. The defendant, to maintain the issues on his part, was obliged to prove his seisin when the deed was executed; but it was not necessary to show a seisin under an indefeasible title. A seisin in fact was sufficient, whether he gained it by his own disseisin, or whether he was in under a disseisor. If, at the time he executed the deed, he had the exclusive possession of the premises, claiming the same in fee-simple by title adverse to the owner, he was seised in fee, and had a right to convey. If Weare Drake had no authority to convey the premises to the defendant, yet if in fact he entered under color, though not by virtue of that deed, and acquired a seisin by disseisin, by ousting the former owner, he has not broken these covenants. In this case, the deed of the constable, describing the land and its boundaries, was proper evidence to show the extent and limits of the defendant's seisin, and the intention with which he entered. But we are also satisfied that if the defendant had not afterwards shown to the jury an authority in the constable to make the conveyance, he must have failed, notwithstanding the registry of the deed, which supplies the want of livery of seisin only where the grantor has right to convey, unless he has satisfied the jury that he entered under color of that conveyance, and had acquired a seisin of the premises.

The measure of damages, in cases of this nature, has required the attention of the court. When the breaches assigned to the first and third covenants are found for the plaintiff, it then appears that those covenants were broken as soon as the deed was executed; that no estate or interest passed by the conveyance; and that the plaintiff's entry, although under color of it, was tortious, and a trespass or disseisin to the owner. Hence it is clear that an action for a breach of these covenants cannot be maintained by an assignee of the purchaser, because no estate passed to which these covenants could be annexed, and because being in fact broken before any assignment could be made, they were choses in action, and not assignable. Another consequence is that as no estate passed by the conveyance, the plaintiff could lose no estate by the breach of these covenants, and that he hath lost nothing, but the consideration which he paid for the intended purchase. The verdict finding these covenants thus broken, operates as a disaffirmance of the original contract of conveyance. The conclusion is then inevitable that the only legal measure of the damages for the breach of these covenants is the consideration paid, and interest upon from the payment to the verdict, this being all that was lost by the breaches assigned. It has been objected that if the covenant had not been broken, the plaintiff would then have been seised of the land, and, therefore, ought to be considered as having lost it by the breach of the covenant. If the objection be allowed, the measure of the damages will still be the consideration paid, with interest; for the value of the land must be taken at the time the covenant was broken, which was immediately on executing the conveyance, and the consideration paid by the purchaser will be deemed, as to him, to be a fair price for the land.

We give no opinion as to the rule of assessing damages, where the grantee was seised by virtue of the conveyance, and has been lawfully ousted or evicted under a paramount title. The rule in that case may be derived from different principles. In the case before us, it is our opinion that the verdict be set aside, and a new trial granted, because the deed of Weare Drake was rejected, and because the rule for assessing damages was not correctly stated to the jury.

New trial granted.

See *Horford v. Wright*, and note thereto, 1 Am. Dec. 8, and *Statts v. Ten Eyck*, 2 Id. 254. So recently as *Russ v. Alpaugh*, 118 Mass. 372, this case

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was cited and its authority recognized. In *Caswell v. Wendell*, 4 Mass. 108, it was again decided, that for a breach of the covenant of seisin, the measure of damages is the value of the land at the time of the conveyance, and interest thereon, until the time of the judgment.

WHEELWRIGHT v. WHEELWRIGHT.

[2 Mass. 447.]

DELIVERY OF DEED.—A deed signed, sealed, acknowledged, and delivered to the custody of a third person as the deed of the grantor, to be delivered over to the grantee, on some future event, takes effect presently as the deed of the grantor, the third person being a trustee of it for the grantee.

SAME.—If delivered to a third person as the writing or escrow of the grantor to be delivered on some future event, it is not the grantor's deed until the second delivery; and if possession of it be obtained by the grantee before the happening of the event, the grantor may generally avoid it by pleading *non est factum*.

PETITION for a partition of thirty-one acres of land, of which petitioners claimed to be seised of six undivided ninth parts in common with the respondent, Aaron Wheelwright. Respondent pleaded as a bar, that he was the heir in tail of his father, Joseph Wheelwright, to whom the lands had been devised in tail by one Samuel Wheelwright; and traversed the seisin in common with the petitioners. Replication and joinder in issue.

Upon the trial, the will of Samuel Wheelwright was produced, and it was admitted that the respondent was the heir male of the devisee, who was also the father of J. Wheelwright, one of the petitioners, and of the husband of Mary, another of the petitioners, and the grandfather of the remaining petitioners. In support of their claim, the petitioners produced two deeds by the father, Joseph, bearing date May 4, 1795, purporting to convey four-ninths of the premises to one of the petitioners, and two-ninths thereof to the remaining petitioners. Proof of the execution of these deeds being demanded, Nathaniel Wells was called, who testified that in the year 1795, he wrote out the two deeds, and that on the fourth May, 1795, the father signed and sealed the deeds in the presence of the witness and his brother, since deceased, who subscribed their names as witnesses, and delivered them for the use of the grantees to witness. That it was the intent of the parties that the grantor should have the use of the premises during his life; and as some of the grantees were minors, and could not secure

the use to him, the deeds were delivered as escrows, to be delivered by witness to the grantees upon the death of the grantor, which witness has done. Witness understood from the grantor that his intent in executing the deeds, was to prevent the entail from depriving the grantees of the land conveyed.

The counsel for the respondent objected to the admission of the deeds as evidence, upon the ground that there was no proof that they or either of them were duly executed and delivered by the grantor in his life-time to the grantees, or to any person authorized to receive the same; and that they were not made *bona fide*. The objection was overruled, and the deeds allowed to be read in evidence. Upon verdict being found for the petitioners, the respondent filed his bill of exceptions.

Mellen and Solicitor-general Davis, for the respondent.

Wallingford, for the petitioners.

By Court, PARSONS, C. J. The right which the father of the respondent had to convey any of the lands he held in tail, must be derived from the statute of March 8, 1792. By that statute it is made lawful for any person of full age, seised in fee-tail of any lands, by deed duly executed before two subscribing witnesses, acknowledged before the supreme judicial court, court of common pleas, or a justice of the peace, and registered in the records of the county where the lands are, for a good or valuable consideration *bona fide* to convey such lands, or any part thereof, in fee-simple to any person capable of taking and holding such estate; and such deed, so made, executed, acknowledged and registered, shall bar all estates tail in such lands and all remainders and reversions expectant thereon.

From inspecting the deeds produced in evidence in this cause it appears that two subscribing witnesses, to whose credibility no objection is made, have certified that they were signed, sealed and delivered in their presence. And it further appears that the grantor on the same day acknowledged that each instrument was his deed before a justice of the peace. One objection made by the respondent is, that admitting the deeds to have been executed in the form and manner required by the statute in this case, yet these conveyances are not *bona fide*; being made not for a valuable consideration, but for the purpose of depriving the heir in tail of his inheritance. The deeds purport to be for a valuable consideration in money, and for love and affection to his issue, which is a good consideration.

The statute also provides that the conveyance may be on good consideration. It is therefore very clear that the statute intended that the tenant in tail might bar the heir in tail, by deed conveying the land to his relatives executed for a good although not a valuable consideration. This he might do by a common recovery; and this method by deed is substituted by the statute in the place of that common assurance, the effect of which is founded on legal fiction. And it is certain that justice or parental affection will often induce parents who hold their lands in tail to make provision for the younger branches of their family out of the entail. As the statute has made the estate tail assets for the payment of the debts of the tenant, before and after his decease, a *bona fide* conveyance was required by the statute, to prevent alienations to defraud creditors, and not to protect the heir in tail. This objection cannot prevail.

The other objection is, that, by the statute, the conveyance should be completed, and the estate pass, in the life-time of the tenant in tail, and that the deed should be sealed, delivered and acknowledged by him as his deed; that in the case at bar the deeds were delivered by the grantor to Judge Wells, not as his deeds, but as his writings or escrows, to be delivered as his deeds, by the judge, to the grantees, on his, the grantor's, death; that they could have no effect until delivered by the judge accordingly; and as the grantor was dead before the second delivery, they were never his deeds, but are void. This objection seems to deserve much consideration. The statute certainly intended that the conveyance of the estate tail should be executed in the life-time of the tenant; and, therefore, if there be no acknowledgment of the deed by him, the defect cannot be supplied by the testimony of the subscribing witnesses after his death, as it may be in conveyances of estates not entailed. The reason is, as common recoveries must be suffered in the life-time of the tenant in tail, and at a court holden at stated times, and the heir in tail has a chance that the tenant may, after the commencement of the suit, die before the term, so it was intended to leave him the chance of the tenant's dying before acknowledgment, which, as the statute was first drawn, could be made only in some court of record; although, as it was amended, it may now be made before a justice of the peace. There is, therefore, some chance saved to him, but of much less consequence than it was before the bill was amended. The law, so far as it relates to the nature of this

objection, is very well settled. If a grantor deliver any writing as his deed to a third person, to be delivered over by him to the grantee, on some future event, it is the grantor's deed presently, and the third person is a trustee of it for the grantee; and if the grantee obtain the writing from the trustee before the event happen, it is the deed of the grantor, and he cannot avoid it by a plea of *non est factum*, whether generally or specially pleaded. This appears from Perk. 143, 144, and from the case of *Bushell v. Pasmore*, 6 Mod. 217, 218. But if the grantor make a writing and seal it, and deliver it to a third person as his writing or escrow, to be by him delivered to the grantee, upon some future event, as his, the grantor's, deed, and it be delivered to the grantee accordingly, it is not the grantor's deed until the second delivery; and if the grantee obtain the possession of it before the event happen, yet it is not the grantor's deed, and he may avoid it by pleading *non est factum*. This appears from Perk. 142, 137, 138. It is generally true that a deed delivered as an escrow, to be delivered over as the deed of the party making it, on a future event, takes its effect from the second delivery, and shall be considered as the deed of the party from that time: Perk. 143, 144; 3 Co. 35 b. 36 a.

Whether the deeds in this case were delivered to Judge Wells, as writings to be delivered over as the grantor's deeds on his death, or whether they were delivered as the deeds of the grantor to Judge Wells, in trust for the grantees, to be delivered to them on the grantor's death, is a question of fact to be determined by the evidence. This evidence results from the testimony of Judge Wells, and from the inspection of the deeds. The deeds appear to have been signed, sealed and delivered in the presence of two subscribing witnesses, and to have been acknowledged as the deeds of the grantor before a justice of the peace. The witness swears that the grantor did then sign, seal and deliver them for the use of the grantees. Thus far there can be no doubt. But the witness further testifies that, because the grantor was to have the use of the premises during his life, and some of the grantees being minors, the deeds were delivered to him as escrows, to be delivered to the grantees upon the grantor's death. What the witness understood by escrow is not explained. He might consider them as escrows, because he was to have the custody of them until the grantor's death. To aid his memory, he therefore refers us to the memorandum he made at the time upon the wrapper of the deeds. In that memorandum they are called the two deeds of the

grantor, naming him, to the grantees, naming them, to be kept until the death of the grantor, and then to be delivered to the grantees. Here they are not called the writings, or escrows, but the deeds of the grantor. The weight of the evidence is certainly very great, if not conclusive, in favor of the deeds having been delivered by the grantor, as his deeds, and deposited with Judge Wells, in trust for the grantees. Upon this ground the deeds were very properly admitted as evidence, and the direction of the judge correct.

But if the deeds are to be considered as delivered to Judge Wells, not as the deeds, but as the writings of the grantor, we must not thence conclude that they are void. Although generally an escrow takes its effect from its second delivery, yet there are excepted cases in which it takes its effect, and is considered the deed of the maker, from the first delivery. The exception is founded on necessity, *ut res valeat*. Thus Perk. 139, 140. If a *feme sole* seal a writing, and deliver it as an escrow, to be delivered over on condition, and she afterwards marry, and the writing be then delivered over on performance of the condition, it shall be her deed from the first delivery; otherwise her marriage would defeat it. In Brook's Reading, on the statute of limitations, p. 150, there is another exception. A. delivers a deed as an escrow to J. S., to deliver over on condition performed, before which A. becomes *non compos mentis*; the condition is then performed, and the deed delivered over; it is good, for it shall be A.'s deed from the first delivery. Another exception is in 3 Co. 35 b, 36 a. Lessor makes a lease by deed, and delivers it as an escrow, to be delivered over on condition performed, before which lessor dies, and after it is delivered over on condition performed, the lease shall be the deed of the lessor from the first delivery. There is also a strong exception in 5 Co. 85. If a man deliver a bond as an escrow, to be delivered on condition performed, before which the obligor or obligee dies, and the condition is after performed, here there could be no second delivery, yet is it the deed of the obligor from the first delivery, although it was only inchoate; but it shall be deemed consummate by the performance of the condition.

Therefore, if the deeds in this case were delivered to Judge Wells as escrows, and by him delivered over on the death of the grantor, they must take their effect, and be considered as the deeds of the grantor from the first delivery, he being dead at the second delivery. And the cases in 3 Co. 36 a., and 5 Co.

85, are in point. It may be here observed that it is not to be presumed that it was the intention of the grantor to deliver these deeds as escrows, to be afterwards delivered as his deeds, on the event of his death; when, from the nature of the event, they could not be considered as his deeds from the second delivery. The presumption is violent that he considered Judge Wells as a trustee of the grantees. But whether the deeds were delivered to him as escrows or in trust for the grantees, in either case the verdict must stand, and the first judgment be entered thereon, viz., that partition be made, and let a warrant issue to commissioners to make partition.

See *Halluck v. Bush*, 1 Am. Dec. 60, and note. The frequency of the citation of this case shows it to be one of considerable importance regarding the delivery of deeds. In the Massachusetts courts it has been very frequently cited; lately in *Hall v. Hickey*, 112 Mass. 173; in *Regan v. Howe*, 121 Id. 426. It is cited frequently by the Connecticut courts, as in *Hale v. Hills*, 8 Conn. 42; *White v. Bailey*, 14 Id. 276; *Merrills v. Swift*, 18 Id. 262. Also, in New York: *Stanton v. Miller*, 58 N. Y. 202; *Hathaway v. Payne*, 34 Id. 106, where the court say: "In the case of *Wheelwright v. Wheelwright*, a distinction is made which I regard as sound, and which, I think, has not been questioned since."

ERSKINE v. TOWNSEND.

[2 MASS 493.]

DEED WHEN A MORTGAGE. — A bond conditioned to reconvey an estate, which had been conveyed by deed of the same date, on payment of a sum of money, is a defeasance of the deed, which will be considered as a mortgage.

THE question in this case was, whether a bond to reconvey an estate, upon payment of a sum of money, bearing even date with a conveyance of the same estate from the obligee to the obligor, amounted to a defeasance, and would entitle the obligee to an equity of redemption. The facts appear from the opinion of the court.

Mellen, for the plaintiff.

Potter, for the defendant.

By Court, PARSONS, C. J. This action is a writ of entry, in which the plaintiff demands the land described in the writ against the defendant, and declares on his own seisin within two years, and on a disseisin by the defendant. The defendant

very improperly prays oyer of the deed declared on, when the plaintiff did not count upon, or make a profert of any deed; and the court grant oyer. Upon hearing the deed it appears to be an absolute conveyance in fee-simple, of the land demanded, from the defendant to the plaintiff, for the consideration of two hundred and sixty dollars, and it bears date February 9, 1804. The defendant then pleads a bond dated the same day, in the penal sum of five hundred dollars, with a condition, after reciting that the defendant owing the plaintiff two hundred and forty-one dollars and thirty cents, and for the better securing the payment of the same, had conveyed to the plaintiff fifty acres of land, that if the defendant should pay the plaintiff that sum in six months, and the plaintiff shall then reconvey the land to the defendant, the bond was to be void. The defendant then avers that the land mentioned in the condition is the same land described in the deed, and that the same bond was made as a defeasance of the deed. He then confesses the breach of the condition, and prays to be heard in equity that he may have liberty to redeem the land demanded, and thus conveyed in mortgage. To this plea there is a general demurrer and joinder.

In deciding this issue in law, it may be convenient to explain the nature of a mortgage in fee of lands, and the rights and remedies of the parties agreeably to our laws. A mortgage in fee is an estate upon a condition defeasible by the performance of the condition according to its legal effect. This condition may be either annexed to and a part of the deed conveying the estate, or it may be contained in another deed, executed at the same time and part of the same transaction, and providing that the estate recited to have been conveyed is to be defeated upon the performance of the condition. The equitable powers of this court do not extend to relieve mortgagors in any other cases than those in which the condition is a part of the deed of conveyance, or is contained in a deed of defeasance of that conveyance. After the creation of this estate upon condition, the mortgagee has presently the same right to enter *in pais*, and take the profits, or by judgment and execution in a writ of entry, that he would have if the estate were absolute; subject, however, to account for the profits to the mortgagor, if he should ever perform the condition, or redeem the estate. And in his writ he may count generally on his own seisin, and the disseisin of the defendant; and if he obtain judgment before condition broken, the judgment will be at common law, and not upon the statute.

The mortgagor, by performing the condition, according to its legal effect, may defeat the estate at law, and if the mortgagee be in possession, he may enter upon him, or eject him by a writ of entry, his title being now absolutely void. Thus it appears that until the condition be broken, the rights and remedies of the parties are legal, and not equitable. When the condition is broken, then the statute interferes, and provides equitable relief for the mortgagor. He may redeem the estate by paying the money due on the mortgage, at any time within three years after the lawful entry of the mortgagee, for condition broken. It is, therefore, necessary then to fix the time when the three years commence, according to the different situation of the parties.

If the mortgagee had entered and taken possession before the condition was broken, and had continued in the receipts of the profits after, the three years do not commence until he give due notice to the mortgagor, after the condition be broken, that he shall thenceforward hold the possession for the condition broken; or, in other words, for the purpose of foreclosing the mortgage, if it be not redeemed.

If the mortgagee had not taken possession before the condition was broken, and he shall lawfully enter and take possession after the condition is broken, the three years will commence from the time of such lawful entry. This entry may be either *in pais*, or in execution of a judgment in a real action. In order to obtain this judgment, the mortgagee must sue a special writ of entry. Instead of declaring generally on his own seisin and on a disseisin by the mortgagor, he must either count on a seisin in fee and in mortgage, so that it may appear that he claims to be tenant in mortgage, or he must allege a seisin in the mortgagor, and a conveyance to himself by deed, which he must plead with a profert, so that on inspection of the deed, it may appear to convey an estate in mortgage. The former manner of specially declaring is good in all cases, but necessary where the condition appears in a defeasance, not in the possession of the mortgagee. The latter manner is sufficient when the condition is a part of the deed of conveyance. If the mortgagee is entitled to judgment in this action, after the condition be broken, the court will liquidate the sum remaining due on the mortgage, and enter a conditional judgment that plaintiff have seisin, unless the mortgagor pay that sum with interest, and the cost of suit, in two months. If the money be not paid in that time, the mortgagee will sue out his execution,

and the three years for redemption will commence on his having seisin delivered to him.

As by the statute the mortgagee can have no judgment after the condition is broken, but this conditional one, thence results the necessity of his declaring as mortgagee, to bring himself within the statute. And it has been settled by this court formerly that if he declare generally, and the mortgagor shall plead in bar that the mortgagee is seised as tenant in mortgage only, the condition of which is broken, the action will be barred. Upon this principle, if the defendant in the case before the court had pleaded properly these facts in bar, and the bond on which he relies is a defeasance, he must have had judgment that the mortgagee take nothing by his writ. As he has not so pleaded, but prays only that the conditional judgment may be entered against him, that he may have the equitable right of redemption after judgment, the only point that remains for the opinion of the court, is the legal effect of the bond. If it be a defeasance, within the intent of the statute, the conditional judgment must be entered accordingly; otherwise the plaintiff must have judgment for his seisin at common law.

The plaintiff's objection to the bond as a defeasance is technical, because, in the condition, it is not expressed that the conveyance is to be void on the payment of the money secured in six months; but that, upon such payment, the grantee shall reconvey. In looking into the bond and condition, we observe that the bond is dated on the same day on which the conveyance bears date, and that the condition recites expressly that the conveyance was made as a security for money due. It is, therefore, manifest that the land conveyed was intended by the parties as a pledge only; and notwithstanding the manner of the grantor's recovering back the pledge, on his payment of the money, is by reconveyance, yet the nature of the conveyance remains the same. It is not absolute, but conditional; and it must be considered as a conveyance in mortgage. When we examine the forms of defeasances, in books of conveyancing, the technical objection seems to have no weight. There are, in Wood's Conveyancer, two forms of a defeasance of a mortgage, in which the condition is that upon payment the grantee shall reconvey.

We are, therefore, of opinion that, as the defeasance is by deed, as the two deeds are but parts of the same transaction, and as the conveyance was to secure the payment of money due, the plaintiff must be considered as a tenant in mortgage, and

can have only the conditional judgment to have seisin unless the money due, with interest and costs, be paid in two months by the defendant.

HART v. FITZGERALD.

[2 MASS. 509.]

REPLEVIN—PART OWNER CANNOT MAINTAIN.—An action of replevin cannot be maintained by a part owner of a chattel for his undivided part; and when it appears from the plaintiff's own showing that he is merely a part owner, the court will abate the writ *ex officio*.

REPLEVIN for all the undivided right which William Bodfish formerly had in four hundred and fifty spruce logs; also, for the undivided half of the same number of other logs belonging to the plaintiff. The defendant avowed the taking, and said that the logs were the property of the plaintiff, one Page and said Bodfish as tenants in common, and set forth their respective shares; that defendant, being at the time of the taking a deputy sheriff, by virtue of a writ of attachment against Bodfish, attached the undivided fourth part of the logs as the property of Bodfish, and duly returned the writ. Defendant traversed the property in the plaintiff, upon which the plaintiff tendered an issue, wherein defendant joined.

Verdict being given for the plaintiff, the defendant moved in arrest of judgment on the following grounds:

1. Because, by the writ, an interest or right in the goods and chattels is commanded to be replevied, and not the goods and chattels themselves;
2. Because replevin does not lie for an undivided part of any goods and chattels;
3. Because it appears, by the writ and declaration, that other persons besides the plaintiff are owners of the goods and chattels therein mentioned, who ought by law to have joined in the action.

Mellen and Kidder, for the plaintiff.

Rice, for the defendant.

By Court, PARSONS, C. J. When a contract is made with two or more persons, and one only sues, the defendant may have the advantage of it on the general issue, without pleading it *a fortiori*, if it appears from the plaintiff's own showing that the contract was made with himself and others not named, nor any legal reason assigned for not naming them; because it

appears that no such contract was made with the plaintiff as he has declared on. But if there are several part owners of a chattel, and an injury be done it, regularly, all the part owners ought to join in an action to recover damages for that injury. In this case, although an injury be done to each part owner, yet they ought to join to prevent the defendant from being harassed by a multiplicity of suits. As the rule is established for the defendant's benefit, he may waive this benefit, by not taking the exception in abatement; and he cannot take advantage of the irregularity under the general issue. So if it appear from the plaintiff's own showing that he is but a part owner, the defendant must take the exception in abatement; because the plaintiff should have an opportunity to show that the defendant has settled with another part owner, and discharged him from all interest in the *gravamen*; or that he had suffered any other part owner severally to sue and recover his part of the damages, in either of which cases the plaintiff's writ shall not abate.

Replevin is an action founded on the general or special property of the plaintiff, and it is settled that when a chattel is illegally taken and detained, all the part owners must join in replevin; and it is a good plea in abatement, that the property is in the plaintiff and another. In this action this irregularity is not pleaded in abatement, or in bar, but it appears from the plaintiff's own showing in the writ, in which he claims an undivided moiety of the chattels said to be unjustly taken and detained; and it is a question whether the defendant can take advantage of this defect thus appearing, or whether he must have pleaded it in abatement. If there is an analogy in the principles of law regulating the forms of actions for injuries to chattels and of actions of replevin, it would seem from the case of *Addison v. Overend*, 6 T. R. 766, that the defendant should have pleaded in abatement, that there was another part owner not named, in order to have the advantage of the omission. But is there such an analogy? In trespass or case for an injury done to a chattel, each part owner in fact is injured, and the damages, if not severed by the form of the action, must be divided among the plaintiffs after recovery. In these actions also there are cases in which one part owner may legally sue alone, without joining his partners. In replevin, which is founded on property, the chattel is to be delivered to the plaintiff, as well as damages to be recovered.

This chattel is not capable in law of severance, and the whole

or none of it can be delivered to the plaintiff; and, if it be delivered to the plaintiff, being but a part owner, he must receive an undivided part in which he claims no property. In replevin, also, we do not recollect any case in which a part owner can sue for his undivided part only. If property in him and another be pleaded in abatement, such plea cannot be confessed and avoided by any matter which the plaintiff can reply to it. There are very strong distinctions between the principles applying to actions of trespass and of the case for an injury done to chattels, in which damages only are demanded, and actions of replevin, in which the property said to be unjustly taken and detained is to be delivered to the plaintiff.

We, therefore, think that the general rule of law must govern, that when a substantial defect in the writ appears on the record, the court ought, *ex officio*, to abate it.

Judgment arrested.

See Freeman on Co-tenancy, secs. 245, 337, 354, 355, citing this case. See *Davis v. Lottich*, 46 N. Y., where this case is cited and its authority recognized.

OLIVER v. NEWBURYPORT INSURANCE COMPANY.

[3 MASS. 37.]

RECOVERY FOR A PARTIAL LOSS.—A vessel was insured from Spain to Teneriffe, and thence to Jamaica; she was captured during the voyage by a French corvette, but retaken by a British privateer and carried into Antigua, and there libelled in admiralty, which decreed a restoration, on payment of one-half the value as salvage: but upon the representation of the master, a part owner, that he was unable to pay the salvage, the court ordered the vessel sold. The master became the purchaser, and on his return delivered the vessel to the former owners. The insured then offered to abandon to the insurers the proceeds of the sale at Antigua, but refused to abandon the ship; but the underwriters refused to accept this abandonment. It was held that the insured were entitled to recover only for a partial loss.

ACTION on a policy of insurance for four thousand dollars on the hull and appurtenances of the ship *Columbia*, valued at ten thousand dollars, at and from Bilboa, or other Spanish ports without the straits of Gibraltar to Teneriffe, and at and from thence to Jamaica. The declaration set forth a total loss by capture by a French corvette.

The following facts appeared under the general issue: The ship was owned two-thirds by the plaintiffs and one-third by

the master. While on the voyage insured she was captured by a French corvette, and eight days afterwards recaptured by two British privateers, and sent to Antigua, where she was libelled as prize. The master claimed the ship for himself and the plaintiffs, and also claimed the cargo in behalf of certain British merchants. The vice-admiralty court ordered the ship and cargo to be restored to the master on payment of half the value thereof to the recaptors, in lieu of salvage. Upon the representations of the master of the lack of funds to pay the salvage, the vessel and cargo were ordered to be sold; at the sale, the master purchased the ship, and received the net moiety of the proceeds. He then returned with the ship to Boston, and after she had been restored to the owners, plaintiffs offered to abandon to the insurers all their interest in the proceeds of the sale of the ship, but refused to abandon the ship. This abandonment the underwriters would not accept. The master testified that soon after his arrival in Antigua he wrote two letters to the plaintiffs, in which he stated the situation of the vessel; but there was no proof of their receipt.

The court directed that the plaintiffs were entitled to recover as for a total loss, and the jury found accordingly.

The defendants thereupon moved for a new trial.

Dexter, for the defendants.

Amory and Otis, for the plaintiffs.

SEWALL, J. The facts material in deciding upon the motion in this case for a new trial are, that the insurance by the policy in question was of the ship *Columbia*, owned for two-thirds by the plaintiffs and one-third by the master, for a voyage from Spain to Teneriffe, and at and from thence to Jamaica; that the ship, in the course of the voyage insured, was captured by the French, and recaptured by the English, who carried the vessel and cargo to the island of Antigua, where upon a libel for salvage they were decreed to be restored to the former owners, upon payment of the one-half of their value to the recaptors; that the master, soon after his arrival at Antigua, and again during his stay there, advised the insured of the capture of the ship and cargo; that the cargo was taken out and sold there, and that the vessel was also sold under a decree of the admiralty, at the instigation of the master, upon an alleged want of funds to pay the salvage; that the master became the purchaser of the ship, and returned in her to Boston, where she has since become the joint property, or is in the joint management and

control of the insured and the master as before; that the assured, before bringing this action, offered to abandon to the underwriters all interest in the proceeds of the sale of the ship, but refused to abandon the ship. Upon these facts, the jury at the trial were directed to find a verdict for the insured as for a total loss. This direction is complained of on the part of the defendants, who move for a new trial.

The demand of the plaintiffs for a total loss is resisted by the defendants, upon two grounds; because, 1. The insured, at the time of their offer to abandon, had no right to abandon and to recover for a total loss; and, 2. If they then had the right, they have not entitled themselves to recover for a total loss, by their abandonment of the net proceeds of the ship, when the ship itself had been recovered and was in safety in their possession and use, in consequence of a purchase by their partner and agent, either originally made for them, or which has availed to their benefit. It seems admitted in the argument for the defendants, and if it were not, I think it unquestionable, that the events in this case, up to the time of the captain's purchase of the ship, constituted a technical total loss, if the assured had elected so to consider it. A capture and a recapture subjecting the property recovered to a charge of half its value, to be paid upon the restoration of the vessel at a port out of the course of the voyage insured, where the cargo procured for the voyage was necessarily discharged and sold; and when, by these events, the voyage itself was entirely defeated, are circumstances constituting a technical total loss, according to many decisions which might be cited. I shall mention only the case of *Goss et al. v. Withers*, 2 Burr. 683, and *Milles v. Fletcher*, Doug. 219. But a total of this kind is total only at the election of the insured, and the rule adopted upon this subject is, that the election of the insured is to be made and notified as soon as may be after he has intelligence of the state of his property. If the advice addressed by the captain from Antigua to the insured had been received by them before the arrival of the ship at Boston, their neglect to notify the insurers was a forfeiture of the right of abandonment. This rule and the application of it were very fully discussed in the case of *Mitchel et al. v. Eddie*, 1 T. R. 608, and the doctrines of that decision were recognized and enforced in the case of *Livermore, assignee, v. The Newburyport Marine Insurance Company*, 2 Mass. 232, recently decided by this court. But the facts before us do not warrant a conclusion that the insured had received

any advice of the state of their property, until the return of their captain and vessel to Boston. And whether they could then abandon and demand a total loss, is a question to be decided upon the other circumstances of this case.

If the purchase of the captain may be considered in the event a recovery of the ship to the insured, it became so by their assent to it after his return, and the consequent restoration of the property to its original state. The purchase was not at the time necessarily or professedly for the account of the insured, nor does the general authority of a master extend to the power of binding his owners in a purchase of that kind, and there is no pretense of any special authority in this case. Nor will the mere safety of the vessel, if the insured refuse to accept it when the voyage has been entirely defeated, deprive the owner insured for a particular voyage of the right of abandonment. All the decisions in cases of detention by embargo, where a total loss has been recovered upon the insurance of vessels remaining in safety, *Marshall*, 439, 441, 488, 505, and particularly the judgment by the king's bench, in the case of *Rotch v. Edie*, 6 T. R. 425, are authorities to this effect. The case of *Goss et al. v. Withers*, 2 Burr. 683, may be cited to the same purpose. The case of *Poole v. Fitzgerald*, 5 Bro. P. C. 131; Park. 170, has been relied on; but upon examination, it will not be found to warrant a contrary doctrine. That was the case of an insurance upon a privateer for a cruise of four months, the vessel valued at one thousand pounds, without further account, and free from average. By the mutiny and desertion of her crew, the cruise was prevented for a part of the term insured; but the vessel remained in safety at her accustomed port. The decision was against the plaintiff, the insured, grounded upon the peculiar terms of the policy, which was construed to entitle the insured to recover only in the event of a total loss; the policy being for the sum insured without account, and free of average; and it being impossible that the loss should be considered total, while the vessel itself remained in safety.

Upon the ground, then, that the return of the ship to Boston was not for the account of the insured, unless by their election to receive it of the captain; and that the loss of the voyage insured, with the other facts stated, would entitle them to demand a total loss by the policy in this case upon a suitable abandonment of the actual salvage, it seems necessary to come to the remaining question, whether there has been such an abandon-

ment, and I have authority to say that the direction complained of was a decision upon this question only. It was the apprehension of the justices who presided in the trial that in a decision not final upon any question of law, they were to govern themselves by the decisions of this court, which have been cited in the cases of *Welman v. Gray*, and *Storer v. Gray*, 2 Mass. 565. The acceptance by the assured of their shares in the ship purchased by their partner and general agent, was an assent equivalent in all respects to a previous authority: and having retroactive effect, whatever had been done by the master of the vessel and the partner of the insured, in purchasing and refitting the vessel, and in prosecuting another voyage, is to be considered as the acts also of the insured in the disposal of their property, whether recovered and held in their former right, or by a new and distinct title.

If the purchase in this was, in its effect upon the contract of insurance, a recovery of the property, to be treated as a recovery in the former right of the insured, their acceptance and subsequent disposal of the ship, and especially their refusal to abandon it to the insurers, was a waiver of the right of abandonment. And upon the same reasoning an abandonment of the sales at Antigua was insufficient, because not made of the actual salvage the ship recovered. On the other hand, if the ship returned to the assured by a new and distinct title, affecting the insurers in their contract as well as all other persons, then the loss continued in every respect total at the time of the offer to abandon; and the abandonment offered in this case was valid and sufficient to entitle the insured to recover for a total loss. When the case of *Storer v. Gray* was decided, I had the honor to be a member of this court, and I concurred in the decision. The case was similar, in many respects, to the present; differing only in the circumstance of a decree compelling a sale; whereas, in the present case the sale was made at the instance of the party purchasing under it. That decision was, as I recollect, upon these grounds, that the decree of a court of admiralty in a foreign country, having jurisdiction in a case of capture and recapture, ordering a sale for payment of salvage, was, in itself, a change of property; that the master, either with or without the assent of his owner, the insured, might avail himself by purchasing at an authorized and compulsory sale; and in any purchase made for the account of the insured party, he would become the owner in a new right; that the master had no general authority to purchase at the risk or for

the account of the insured or the insurers; and that they could not jointly claim the benefit of a purchase made by the master at his own risk; and a prevailing argument was, that these principles had governed the court in the prior decision, which has been cited in the case of *Welman v. Gray*.

It must be allowed, I think, that there are difficulties attending any rule that can be contemplated for the decision of cases of the kind which have been cited. If it should be decided that the insured were, by a purchase of this kind, when fairly made for their account, chargeable absolutely with a new risk, very great and obvious objections occur on their part. And in adopting a rule less objectionable, which has been urged upon the attention of the court, it is obvious that an agent by necessity, proceeding with fair intentions, for the apparent benefit of the concerned, may become a sufferer by his agency and involve himself in expenses, from which in a different event he could derive no emolument, contrary to the maxim, *cujus est commodum ejus est onus*. On the other hand, the court have never been inattentive to the circumstance that in their decisions which have been cited, as well as in the present case, the allowance of a total loss upon a policy, where the subject-matter of it has been actually recovered at a comparatively small expense, gives an advantage to the assured, inconsistent with the principle, that contracts of insurance are to be construed and carried into effect as contracts of indemnity.

The decision by Lord Kenyon, in the case of *McMasters v. Shoolbred*, 1 Esp. 237, leaves that principle unimpaired, and confines the insured to an indemnity. In that case a vessel insured for six months was, after capture, but without any regular condemnation, sold by the captors, and purchased by the master for the account of the owners. Lord Kenyon considered the master as the agent of the owners, and the vessel as recovered for their account, and the price paid as a salvage or ransom constituting an average loss. The principle of this decision has been recognized in the supreme court of the state of New York in the cases of *Saidler and Craig v. Church*, 1 Caines, 297, 2 Am. Dec. 191, *in notis*, and *Abbott v. Broome*, Id. 292, 2 Am. Dec. 187, and in the court of errors of that state in the case of *Robinson and Hartshorne v. The United Insurance Company*, 2 Caines, 280. In those cases, purchases (or circumstances very similar to what are stated in the case before us), made by a master or general agent of the party insured for the account of the concerned, were deemed recoveries of the prop-

erty insured upon the original right of the owner, and when the purchase was accepted and confirmed by him to be for his account, and to be for the account of the insurers when accepted by them after lawful abandonment. It is observable, however, that in the cases mentioned, with the exception of *Saidler v. Church*, which, in this respect, goes beyond the English precedent in *McMasters v. Shoolbred*, there was no condemnation or compulsory sale of the property by a regular decree of the court of admiralty. In the present case, the sale was not originally decreed, but was procured at the instance of the master, acting for the concerned, and becoming afterwards the purchaser. Whether this circumstance makes an essential difference or not between this case and the decisions of this court which have been cited, it is unnecessary now to determine. Upon the general principle of not exceeding an indemnity to the assured, and upon the reason rather than the direct authority of the cases cited, I am better satisfied to be able to form my opinion from what is known of the substantial condition of the property for which an indemnity is claimed, rather than from the formal changes of the title evidenced by writings managed solely by the party claiming a beneficial interest under them, to the loss and injury of the party against whom the claim is made.

And upon the whole, my opinion in the case before us is that a sale procured at the instance of the master having charge of a vessel in a foreign port, where he becomes a purchaser at a price very inadequate to the value of the vessel when restored to her former owners, is made for their account, if they elect to receive the vessel; and that by receiving it they waive their right of abandonment, and cannot afterwards entitle themselves to recover for a total loss, because these proceedings in any question between the owners and their insurers, are to be construed a recovery of the property by the owners in their former right. I am, therefore, in favor of granting a new trial.

SEDEWICK, J. [Having first reviewed the facts in the case.] The jury were directed that the plaintiffs, upon the foregoing facts, were entitled to recover as for a total loss, and they found a verdict accordingly. If this direction was right, the verdict ought to stand, and judgment be rendered conformably to it; but if the evidence proves that the plaintiffs are entitled to recover for a partial loss only, then a new trial must of course be granted.

Two reasons are given why there ought to be a new trial. 1. Because from the evidence in the case there is reason to apprehend that the captain practiced fraud in procuring the sale of the ship, by order of the vice-admiralty court, although no question relative thereto was made at the trial; 2. Because the court directed a verdict for the plaintiffs as for a total loss, when admitting all the evidence to be true, they had sustained a partial loss only.

As to the first question, whether the evidence will warrant a suspicion of fraud, or whether, if it does, as it was all known to the defendants at the trial, and no question on that ground was then raised, it would be proper now to send the case back for a new trial, I give no opinion, because should a new trial be had for that reason only and the question of the fraud of the master be negatived, we should then be met with the great question in the case and obliged to decide it. Besides, this course of procedure would, in the meantime, leave a very important principle of the law of insurance unknown and uncertain among those concerned in this branch of commerce, and the effects of that uncertainty could not fail to be embarrassing and mischievous. From this consideration it has become the duty of the court, however unpleasant under the circumstances the performance of it may be, by a decision to put this question at rest.

The question to be determined is, whether such facts and circumstances were proved at the trial, as entitled the plaintiffs to recover as for a total loss. By sustaining the motion for a new trial, this question was considered by the court as not definitively settled by the cases of *Welman v. Gray*, and *Storer v. Gray*, which have been cited and pressed upon the consideration of the court; otherwise it is obvious that it would have been absurd to have received the motion and permitted it to have been argued. We have heard it argued repeatedly and ably. We have taken time to deliberate, and have given the subject much consideration, and the result we are now to pronounce. It was attempted by the counsel for the defendants to distinguish this case from those of *Welman v. Gray*, and *Storer v. Gray*, as in the former there was a condemnation before the sale, and the latter there was a compulsory process to compel the sale; neither of which circumstances attended or preceded the sale in this case. Whether both or either of those cases are thereby distinguishable from this, I give no opinion; and as they may again be brought before the court, it would be

wrong to do it. As an insurance is a contract of indemnity, and nothing more; as this is an attempt to recover more than ten times an actual indemnity; as the sale was at the instance of the master, who was a part owner; as by the restoration to the other owners, the plaintiffs, it is evident that the purchase was intended for the joint benefit of all the owners; as, by the plaintiffs' acceptance of the ship, they ratified the captain's act, and by retrospection the purchase must be considered as made jointly by the plaintiffs and the captain; so that there never was a moment from the time of the contract till the offer of abandonment, such as it was, was made and refused, that the property in the ship was altered. It would, in my opinion, violate the very nature and chief principle of the law of insurance, and subvert the main intention, and destroy the utility of the contract, to authorize a recovery for a total loss, when in fact a very inconsiderable partial loss only has been sustained.

On the part of the plaintiffs, it is contended that a sale in pursuance of a legal order of court, in all cases, operates a change of property, and that it is indifferent whether the purchase be made by the owner, the assured, or by a stranger; that by the capture the plaintiffs had a right to abandon, which right was not affected by the recapture, as by it the recaptors were entitled to one half the value of the ship for salvage, being the amount of salvage to which American recaptors were, by a statute of the United States at that time, entitled; and that by the purchase the ownership of the plaintiffs was by a title altogether distinct from and independent of that which was insured by the policy. I cannot but observe that if such a sale as that under consideration is of the nature, and to be followed by the consequences contended for, a door will be opened for the practice of fraud, in all cases difficult, and in many impossible, to be detected. A master in a distant region, by address and fraudulent representations, may obtain, under the most false pretenses artfully disguised, an order of a judge to sell his vessel. This may be in a port where there are few or no buyers, and of consequence he may become the purchaser for a mere trifle, come home, and on abandoning the proceeds of the sale, retain the vessel, and receive her full value of the underwriters. This would be a commerce equally profitable and iniquitous, to which the establishment of such a principle would afford motives too strong in all cases to be resisted. To this it may be answered, that if the purchase be made by a stranger by collusion with the captain, the same mischiefs will

take place. It is true; but then it is equally true that in a strange country it will be difficult to form such a combination, and if formed, it is more easily detected than the same fraud would be if practiced by the captain alone; and surely no facility ought to be afforded to the practice of frauds so injurious to commerce. To support this principle no authority has been shown, and it is presumed none can be, unless the cases before referred to, of *Storer v. Gray* and *Welman v. Gray*, may be supported to warrant it; and I have already observed that, by permitting this case to be argued, the court has determined that it was not definitely settled by those cases.

In the case of *Milles v. Fletcher*, Doug. 220, Lord Mansfield said that he took great pains in delivering the opinion of the court in the cases of *Goss v. Withers*, 2 Burr. 694, and *Hamilton v. Mendes*, Id. 210; that he had upon that occasion read both those cases; and that he thought that from them the whole law between insurers and insured, as to the consequences of capture and recapture, might be collected. The cases mentioned by Lord Mansfield were argued by the most able counsel in England, before the most learned court in Europe, at the head of which was the greatest man that probably ever sat in a court of justice. The law of nations, the law of England, and the laws of the other maritime nations of Europe were all taken into consideration, and principles established which have ever since, I believe, been considered as perfectly sound and well founded. After an interval of twenty years, these principles are revised and reconsidered by the same court, and again receive their unanimous and unqualified approbation. Such principles, so deliberately adopted and so gravely pronounced, ought not, for slight reasons, to be violated. If they remain unshaken, the present case must, I think, be governed by them. In the case of *Goss v. Withers*, Lord Mansfield says: "The insurer runs the risk of the insured, and undertakes to indemnify; he must therefore bear the loss actually sustained, and can be liable to no more. So that if, after condemnation, the owner recovers the ship in her complete condition, but has paid salvage or been at any expense in getting her back, the insurer must bear the loss so actually sustained." Here the true principle is laid down and illustrated. If the owner recover the ship in her complete condition, the insurer must pay the loss actually sustained, and he is liable to no more.

In the case under consideration, the loss actually sustained was less than a thousand dollars; and this, according to the

rule established, is all the plaintiffs ought to recover. The demand, instead of one thousand, is ten thousand dollars. And this rule of apportioning the damages to the amount of the damnification, is to govern, even after condemnation: Park. 159; which is certainly as efficacious, to divest the owner of his property, as a sale, as was the case here, at the instance of one of the owners, and a purchase by him for and on account of the joint owners, which was afterwards ratified by them. The owners did, after all the loss had happened, and before the pretended offer to abandon, recover the ship "in her complete condition." And it is afterwards, in the same case, observed that "in questions upon policies, the nature of the contract, an indemnity, and nothing else, is always liberally considered." That surely could hardly be considered as a liberal construction of a contract, which is entered into for the purpose of indemnity and nothing else, where he who has the subject for which the indemnity is stipulated restored to him in its complete condition, refuses to deliver it, and demands ten times the amount of the damnification; it would not be a liberal construction which should determine that a demand so unreasonable was to be satisfied.

In the case of *Hamilton v. Mendes*, Lord Mansfield, in delivering the opinion of the court, says: "The plaintiff's demand is for an indemnity. His action, then, must be founded upon the nature of his damnification as it really is at the time the action is brought. It is repugnant upon a contract of indemnity to recover for a total loss, when the final event has decided that the damnification, in truth, is an average, or perhaps no loss at all." No words which could have been selected would, with more precision, have decided the question under consideration against the plaintiff. Lord Mansfield adds, that "whatever undoes the damnification, in whole or in part, must operate upon the indemnity in the same degree." Now, in this case, the whole damnification to the assured, if the ship had actually been lost, would have been ten thousand dollars; but the purchase by one of the owners for the benefit of all, and her restoration to them in her complete condition for less than one thousand dollars, so far undid the damnification, and must, of course, if the authority of the case of *Hamilton v. Mendes* be respected, operate upon the indemnity in the same degree. In other words, the total is thereby reduced to an average loss. The court, as if anxious to determine that the restoration of a ship in her complete condition to the assured, before abandonment,

defeated his right to abandon, further say: "The notion of a vested right in the plaintiff to sue as for a total loss before the recapture, is fictitious only, and not founded in truth. For the insured is not obliged to abandon in any case; he has an election; no right can vest as for a total loss till he has made that election. He cannot elect before advice is received of the loss; and if that advice shows the peril to be over, and the thing in safety, he cannot elect at all, because he has no right to abandon when the thing is safe." In this case, the plaintiffs did not "elect to abandon" the ship, but refused. When the demand was made as for a total loss, the ship was in safety, and in the possession of the plaintiffs. It is further added: "Writers upon the maritime law are apt to embarrass general principles with the positive regulations of their own country; but they seem all to agree that if the thing is recovered before the money paid, the insured can only be entitled according to the final event. Lord Mansfield, to express as strongly as he could how altogether without foundation was the contrary doctrine, says, 2 Burr. 1212, "The present is the first attempt that ever was made to charge the insurer with a total loss, upon an interest policy, after the thing was recovered." And in the same page, he adds, "that if the thing in truth was safe, no artificial reasoning shall be allowed to set up a total loss." He afterwards, Id. 1213, says that, "without dwelling upon principles and authorities, the consequences of the present question are decisive. It is impossible that any man should desire to abandon, in a case circumstanced like the present, but for one of two reasons, viz., either because he has overvalued, or that the market has fallen below the original price. The only reasons which can make it the interest of the party to desire, are conclusively against allowing it." And what, I ask, is the object of the present action? Certainly to recover more than an actual indemnity; and, as that would be a violation of the very essence of the contract, it is "conclusive against allowing" the demand, for with precision the true rule is laid down: 2 Burr, 1214. "The insurer, by the marine law, ought never to pay less upon a contract of indemnity than the value of the loss; and the insured ought never to gain more." According to the dictates of justice and common sense, it is said that "the daily negotiations and property of merchants ought not to depend on subtleties and niceties, but upon rules easily learned and easily retained, because they are the dictates of common sense drawn from the truth of the case." The chief justice concludes one

of the most able and enlightened arguments that he ever delivered, in these remarkable words: "To obviate too large an inference being drawn from this determination, I desire that it may be understood that the point here determined is, that the plaintiff, upon a policy, can only recover an indemnity according to the nature of his case at the time of the action brought, or, at most, at the time of the offer to abandon." The application of what I have cited from these cases is so obvious and so exactly suited to the case under consideration, that any additional observations would be not only useless, but a misapplication of our time. These opinions have never hitherto since they were delivered been called in question; and, unless they are erroneous, they must be decisive in this case. These cases are cited by both Park, 148, 157, and Marshall, 486, 491, who are among the most intelligent, able and learned elementary writers in their treatises on the law of insurance, with approbation.

The case of *McMasters v. Shoolbred* is, in my opinion, in principle, directly in point. It was an action of *assumpsit* on a policy of insurance. The insurance was on a ship called the *Four Brothers*, to commence from the seventeenth of March, 1793, for six months, from any port. The ship was valued at one thousand pounds. It was proved that the ship sailed from New Brunswick with a cargo of fish, for Barbadoes, and was captured by the *Ambuscade*, a French frigate, and carried into Charleston, in the United States, where she remained upwards of a month, and was then sold by the authority of the French consul there, as a prize, by public vendue, and purchased by the captain, who had been exchanged, for three hundred and eighty pounds, on account of the owners. In addition to this sum so paid for the vessel, two hundred and thirty pounds were paid by the captain, after he had purchased her, for necessary repairs at Charleston, and for fitting her out again for a voyage, after which she sailed for Jamaica. Lord Kenyon, before whom the case was tried, said it was impossible to make this more than an average loss. That a policy of insurance was a contract of indemnity, to which and which only had the insured a right to look. This was the language of Roccas, and its principle had been adopted in every decision on the subject. This was not only the decision of an able and learned judge, but it was confirmed afterwards by the whole court. For at the next term, when a new trial was moved for on a matter of law, it was considered that the question was so very clear that a rule to

show cause was refused. This case is cited by Marshall, 501, as undoubted law; and the principle decided by it he lays down in these words: "So, if a ship be sold by the captors, and the captain, acting as agent for the owners, purchase the ship on their account, this shall be considered as recovering the ship for the owners, and the money thus paid as salvage; and if the voyage be prosecuted, this is only a partial, and not a total loss." It is impossible not to perceive that the case under consideration is brought precisely within this rule. This cannot be denied; but it is said that the case of *McMasters v. Shoolbred* is distinguishable from this, inasmuch as the French consul had no legal authority to exercise judicial powers in the condemnation, or in directing the sale of captured vessels at Charleston, which was within the limits of a neutral country; whereas, the sale, in this case, was in pursuance of a legal order of a court of vice-admiralty. To this I answer, in the first place, that this is a circumstance not at all adverted to, either by the counsel or the judge, and does, in fact, make no part of the case; and that, in the next place, I apprehend that in the reason and nature of things it makes no sort of difference; that purchases and sales by a captain, if authorized by the existing circumstances, and made in the exercise of a sound and reasonable discretion, and for the interest of those concerned, must have the same construction, and be followed by the same consequences, whether made with or without an order of the court. And this, I think, is proved by the case of *Milles v. Fletcher*, Doug. 219. In that case, in which the sale was the act of the captain, without any order of a court, it was determined that a ship and goods, being insured for a voyage, if the ship be taken and recaptured, and on the recapture the captain, acting fairly and for the benefit of his employers, sells the ship and cargo, and thereby puts an end to the voyage, the insured shall recover as for a total loss. And surely it cannot be supposed, if the acts of the captain should, in that case, operate against the insurer, that equal justice does not require that, in this case, he should not receive the benefit of them. Lord Mansfield, in delivering the opinion of the court, says: "The captain, when he came to New York," [the place of sale] "had no express orders, but he had an implied authority, from both sides, to do what was right and fit to be done, as none of them had agents in the place, and whatever it was right for him to have done, if it had been his own ship and cargo, the underwriters must answer for the consequences of, because this is within the contract of indemnity."

In the year 1799, the case of *Saidler & Craig v. Church*, involving the very principle now under consideration, was determined before the supreme court of the state of New York; a court very respectable for learning and talents, and much conversant in questions of insurance. The case is not reported, but what the facts and the decisions were, appears in the report of the case of *Abbott v. Broome*, 1 Caines, 292 (2 Am. Dec. 187). The facts are shortly these: The vessel, in the due course of her voyage insured, was captured by a French privateer, and carried into Guadaloupe, and thereby the voyage was totally lost. At Guadaloupe, the vessel was duly libelled in the admiralty court, and condemned, and after condemnation was purchased by the master, as for the account of the owners, for the sum of eleven hundred and twenty dollars. The master was also a part owner. The owners had since fitted out the vessel and sent her on another voyage. As soon as the owners knew of the capture, and before they were informed of the condemnation, or of the purchase by the master, they gave the underwriters notice of abandonment. It was determined that the assured had adopted the act of the captain as their own, and had thereby waived the abandonment, and had converted the total into a partial loss. If a restoration of the vessel, under those circumstances, was a waiver of an abandonment previously made, no one will doubt that if the restoration precede the abandonment, it must destroy the right to abandon. Much information might be drawn from this case of *Abbott v. Broome*; but this opinion is already grown to an unexpected length.

There is one more case, which I will mention, determined in the same court, that of the *United Insurance Co. of New York v. Robinson*, 2 Caines, 280. In that case it was adjudged that, after an abandonment and payment of loss, a purchase of the property insured by the agent or correspondent of the owner, though made after condemnation, is for the benefit of the insurer, if he elects; and that, therefore, the proceeds of a purchase so made, and any cargo in which they may be invested, become, if he pleases, his property, and he may maintain trover for it against the insured. It is most apparent, with what strength the decision last mentioned supports the principle contended for by the defendants, and to what length it carries it. This decision, however, is considered by the court, and I think justly, as a consequence irresistibly flowing from the judgment in the case of *Saidler & Craig v. Church*. The judg-

ment in the *United Insurance Co. v. Robinson*, has been affirmed in the court for the correction of errors: 1 Johnson, 592.

I mention these cases determined in a sister state, because it would be with much reluctance that I should feel myself bound to establish a rule, upon a subject so important as that of insurance, in opposition to one I found already established in a contiguous state so commercial as that of New York, and established by judges so respectable as I know them to be. The case of *Story v. Strettell*, 1 Dallas, 10, determined in Pennsylvania in 1764, is confirmatory of the same principle.

But it is urged for the plaintiffs, that they are entitled to recover as for a total loss, because the voyage was lost. This claim is founded upon the judgment of the court of king's bench in the case of *Manning v. Newnham*, Park, 169; Marsh. 505. This case was an insurance on the ship *Grace*, her cargo and freight, "at and from Tortola to London, warranted to depart on or before the first of August, 1781. The ship, valued at two thousand four hundred and seventy pounds, the cargo, twelve thousand four hundred pounds, and the freight at two thousand two hundred and fifty pounds, at twenty-five guineas per cent. to return ten per cent. if she departed with convoy from the West Indies and arrived; the ship, freight and goods warranted free of particular average." The ship by sea damage, being a peril insured, was soon obliged to put back into Tortola. The injury to the ship was irreparable, and no other ship could be procured for the cargo; the freight of course was lost; the cargo was sold for a sum within seven hundred pounds of its value, and two-thirds of it purchased by the owners. The insured claimed a total loss and recovered. Lord MANSFIELD, in pronouncing judgment, said: That the court were of opinion that the voyage was totally lost; and that was the ground of their determination. What was said must be taken in relation to the facts in the case. The insurance was on the ship, cargo and freight. The ship was wholly disabled, the freight lost, and, what was the great object, the transportation of the cargo completely defeated. It is impossible not to perceive the difference between that case and the one under consideration. In this last, the ship, on which alone was the insurance made, is in perfect safety, restored in her complete condition to the owners, and by them refused to be abandoned to the underwriters.

But the general position in this case, and which is laid down by the elementary writers on the subject of insurance, that the assured are entitled to recover as for a total loss because the

voyage is lost, has relation to a class of cases, as I apprehend, totally distinct from the one under consideration. In the case of *McMasters v. Shoolbred*, which has been already mentioned, the original voyage, which was intended to carry a cargo of fish to Barbadoes, was completely defeated, and the ship was fitted out for a new voyage to Jamaica. Yet it was determined that it was impossible to make the loss more than an average loss. Suppose that the owner of a ship and cargo should insure by distinct policies on the ship and cargo on a voyage from London to the United States; that the ship should be captured on her voyage, the cargo condemned, and she restored and arrive in safety, and in good condition, and so come into the possession of the owners, no abandonment having been made, and that the loss upon the cargo should be paid. It would, I believe, be against the very nature of the contract of insurance, to authorize the assured to abandon the ship, and to recover as for a total loss of her; and yet the supposed case is in nothing different in principle, that I can perceive, from that under consideration.

It is very true that in case of an embargo or a capture, while they continue, and also during any obstruction of a voyage, from a cause within the contract of insurance, if the continuance be unknown, and not within the control of the assured, he may, where the insurance is on the ship, abandon her; but if such causes of detention cease, and the ship be restored to the use of the assured, and is received by him or his agent, in good condition, the right to abandon ceases also. And the case of *Pole v. Fitzgerald*, Willes's Rep. 641, is directly in point to prove that this insurance must be considered as an insurance on the ship, and not an insurance on the voyage. That was an insurance on the body, tackle, etc., of the Goodfellow privateer, lost or not lost, from Jamaica to any ports or places during four calendar months, beginning the adventure on the ship from the fourteenth of June then last, and to continue until the ship, with her tackle, etc., should arrive at any ports or places where or whatsoever, or cruising from port to port or place to place during the term, without further account, and free from average. The ship valued at one thousand pounds, the insurance was against the usual perils. The ship sailed on the voyage and cruise insured, and after taking a prize, within the the term insured, the crew mutinied against their commander and officers, and by force, against their will, carried her back towards Jamaica, and before her arrival in port there, seized

the boat, fire-arms, etc., carried them off, and deserted the ship, by which the cruise totally lost for the remainder of the term insured. The action was brought for a total loss. In the king's bench, the plaintiff recovered; but upon a writ of error being brought in the exchequer chamber, the judgment, by the unanimous opinion of the eight judges, was reversed, and their judgment was afterwards affirmed in the house of lords. The decision is, therefore, of the highest possible authority. The question was whether it was an insurance of the ship and voyage, or an insurance of the ship only; and the decision of the court was that the insurance was on the ship only; and that she being in safety, the plaintiff could not recover. The chief justice, in delivering the opinion of the court, undertook to prove that the notion that the voyage was insured by an insurance of the ship, was absurd; and among other consequences which he points out, he says: "In the first place, it would be a double insurance both on the ship and on the voyage; for if the ship were lost before the end of four months, the term insured, to be sure the voyage is lost; and if the voyage be lost, according to the plaintiff's construction, 'though the ship' (as in the present case), 'be in good safety at the end of the four months, yet the insurance must be forfeited.'" Willes's, 647. And so very unreasonable did the claim of the plaintiff appear to the chief justice that he said: "If it were necessary to give my opinion of them" (policies on a voyage), "I should think, according to my present sentiments, that if a policy were so drawn as that a voyage were insured by express words, such a policy would be void both as illegal and unreasonable."

Upon the most mature consideration, I am of opinion that the evidence in the case did not warrant a verdict for a total loss, and that, therefore, there must be a new trial.

THATCHER and PARKER, JJ., concurred.

PARSONS, C. J., having been of counsel in the cause, gave no opinion.

New trial granted.

PAUL v. FRAZIER.

[3 MASS 71.]

DAMAGES FOR SEDUCTION.—No action can be maintained by an unmarried woman for seducing her, under pretense of a design to marry her, there being no allegation of a promise of marriage.

ACTION on the case. The declaration set forth that the defendant began to court the plaintiff under pretense of a design to marry her, and having under that pretense gained her affections, got her with child and afterwards utterly forsook her, to her damage in the sum of two thousand dollars. Plea, not guilty; and upon issue joined in the court of common pleas, plaintiff obtained a verdict for one thousand dollars. Upon defendant's motion, that court arrested judgment, whereupon plaintiff appealed to this court.

Blake, for the defendant, contended that no action would lie for an injury of the nature complained of, except by the parent or master for the loss of the service of the daughter or servant: 3 Bl. Com. c. 8, n. 13; 3 Burr, 1878; 3 Wils. 18. No promise of marriage is alleged, which is a good ground of action.

Thurston, for the plaintiff, contended that the action would lie, *Skinner* 119; false affirmations made by defendant with intent to defraud plaintiff, whereby damages are received, are a ground of action in the nature of deceit: *Pasley et al v. Freeman*, 3 T. R. 51; seduction has been held a valid consideration for a contract: *Turner v. Vaughan*, 2 Wils, 339; and it ought to support an action for the damages sustained by it.

By Court, **PARSONS C. J.** This is an action of the case to recover damages against the defendant for seducing the plaintiff under a false pretense of courtship and intention of marriage, and for getting her with child, whereby her reputation has suffered, and her peace of mind been injured. After a verdict for the plaintiff on the issue of not guilty, the defendant moves to arrest the judgment. And we are of opinion that judgment must be arrested. An action of this nature is not given by statute, and there is no principle of the common law on which it can be sustained. Fornication and adultery are offenses in this commonwealth created by statute. And the declaration amounts to a charge against the defendant for deceiving the plaintiff and persuading her to commit a crime, in consequence of which she has suffered damage. She is a partaker of the crime, and cannot come into court to obtain satis-

faction for a supposed injury to which she was consenting. It has been regretted at the bar that the law has not provided a remedy for an unfortunate female against her seducer. Those who are competent to legislate on this subject will consider, before they provide this remedy, whether seductions will afterwards be less frequent, or whether artful women may not pretend to be seduced, in order to obtain a pecuniary compensation. As the law now stands, damages are recoverable for a breach of promise of marriage; and if seduction has been practiced under color of that promise, the jury will undoubtedly consider it as an aggravation of the damages. So far the law has provided; and we do not profess to be wiser than the law.

In *Dennis v. Clark*, 2 Cush. 350, this case is cited, the court saying: "It is also to be remembered that in cases of seduction, the daughter is partaker of the crime, so that she cannot maintain an action against her seducer." The case is also cited in *Sherman v. Rawson*, 102 Mass. 400. In *Weaver v. Bachert*, 2 Barr, 82, Gibson, C. J., referring to the case, says: "It was indeed said by Chief Justice Parsons, in *Paul v. Frazier*, 3 Mass. 73, that where seduction has been practiced under color of a promise of marriage, the jury may consider it to aggravate the damages in an action on the contract. That, however, was not the point decided, and there was neither reason nor authority given for the doctrine in that case." And the court in *Fidler v. McKinley*, 21 Ill. 320, referring to the case, say: "The first American case I have been able to find, in which it was announced, though not in the case, and is, therefore, *obiter dictum*, is the case of *Paul v. Frazier*, 3 Mass. 71, in 1807." The court then stated the facts and the decision on the main issue, and referred to the opinion of Parsons, C. J., wherein he says: "It has been regretted at the bar that the law has not provided a remedy for an unfortunate female against her seducer," etc. In reference to this it is said: "It will be seen what was said by Chief Justice Parsons, which I have italicized, is mere *dictum*, yet it has been made the foundation of the doctrine I am endeavoring to combat." The statutes in California have supplied this defect in the common law, and give a right of action to an unmarried female seduced. Sec. 374, Code of Civil Proceed.

OLIVER v. GREENE.

[3 Mass. 133.]

INSURABLE INTEREST.—A part owner of a vessel, who has chartered the remaining portion, with a covenant to pay the value in case of a loss, may insure the whole vessel as his property.

ACTION on a policy of insurance, as for a total loss of the vessel insured. The plaintiff, who was half owner of the vessel, had chartered her for a term of eighteen months from Mayberry, the owner of the other moiety, and had agreed to pay

the latter one thousand eight hundred dollars in case of loss. Further facts appear from the opinion of the court.

The question in the case was: Has a part owner of a vessel, who has chartered the remainder with covenants to pay the value thereof in case of loss, such an insurable interest in the whole vessel as will entitle him to recover the full amount insured in case of a total loss.

Channing, for the defendant, contended that the covenants in the charter party vested no interest in the plaintiff to which the policy could attach, and that he was entitled to recover only a moiety of the sum insured.

Sullivan, for the plaintiff, was stopped by the court.

By Court, PARSONS, C. J. On the facts disclosed by the case, the court are called upon to determine what insurable interest the plaintiff had in the schooner *Hiram*, when she was lost, for which he is entitled to recover on this policy. There is no question as to one moiety of the schooner, which was the absolute property of the plaintiff; the disagreement of the parties is confined to the other moiety, which he hired of Mayberry, a part owner. It appears from the facts that the plaintiff had hired of Mayberry his moiety for eighteen months; that for the time he was to pay a certain sum per month, and if the schooner was lost during the term, he was to pay Mayberry for his half part eighteen hundred dollars, which sum, it is not contended, was above the value of half the vessel. By virtue of this contract the plaintiff had immediately, on its execution, a special property in Mayberry's moiety, which was at his risk during the term. The contract was fair and legal, and the plaintiff might indemnify himself against the loss by causing himself to be insured. When the schooner was lost, he lost the whole of her; of one moiety he was the absolute owner, and of the other moiety he was the special owner, being liable to pay for her at an agreed price. We are therefore of opinion that the plaintiff is entitled to recover of the assurers the sum insured on the vessel, he being interested in her to that amount. It is stated that the insured gave no information of the nature of his interest in the schooner, and on this ground it has been contended that the plaintiff ought not to recover. If the concealment was of a material fact, undoubtedly the policy would be void; but it is not stated that the fact not communicated was material, and the court cannot presume that it was. Indeed, it appears from the case that this was not made a point; for it is

admitted that the plaintiff is entitled to recover something from the underwriters. Judgment must be entered for the plaintiff conformably to the agreement of the parties. There being in this policy a clause that, that if there be an over-insurance, the underwriters shall be answerable for the interest insured according to the priority of their signatures; and it appearing that of five thousand dollars, the whole sum insured, two thousand dollars were on the cargo, of which there is no loss, each underwriter is to have two-fifths of his subscription deducted. The remaining three-fifths on the vessel not being an over-insurance, the underwriters must pay respectively three-fifths of their subscription, after deducting their several proportions of the sums agreed on by the parties.

NEWALL v. WRIGHT.

[3 Mass. 188.]

MERGER.—A loan was secured by mortgage to be paid in five years, interest payable annually; at the same time a lease was made of the same premises by the mortgagor to the mortgagee for the same period, reserving rent. It will be presumed that the mortgage was first executed, and such mortgage does not bar a recovery of the rent due on the lease.

RENT, WHEN SUSPENDED.—Where a lease was made for a term of years reserving rent, and afterwards the lessor mortgaged the same property to the lessee in fee, and the mortgagee refused to pay the rent, the rent is suspended until the condition is performed, or the estate redeemed, and during the suspension, the lessee must account for the income as mortgagee to be applied in the discharge of the principal and interest of the debt. If rent is voluntarily paid, he cannot afterwards be accountable as mortgagee for the income for such period.

ENTRY BY MORTGAGEE.—A mortgagee in fee may enter immediately on the execution of the mortgage, eject the mortgagor, and receive the profits, there being no agreement to the contrary; when the mortgagor refuses to give possession, the mortgagee may maintain trespass against him, or recover against him as a disseisor.

Action of debt for the rent of certain premises leased to the defendant by plaintiffs' intestate. The facts as agreed upon by the parties were: Andrew Newall, deceased, the plaintiffs' intestate, and Francis Wright, the defendant, executed the lease declared upon, March 29, 1792, whereby the said Andrew Newall demised the premises described to the defendant, for the five years following the date thereof, at the yearly rent of thirty-five pounds which defendant covenanted to pay. On the same

day, at the same time, Andrew Newall conveyed the same premises to the defendant, in fee and in mortgage, to secure the payment of three hundred pounds on or before the twenty-ninth of March, 1797, and of the interest thereon annually. On the thirty-first day of March, 1792, Newall executed a second deed of mortgage of the same premises to the defendant to secure the payment of another sum of eighty-five pounds seven shillings and six pence, with interest on or before the thirty-first day of March, 1793. Afterwards, on the twelfth of October, 1792, and the twenty-fourth of August, 1793, Newall conveyed the same premises in fee and in mortgage to one Harris, to secure the payment of certain sums of money on or before the twelfth of October, 1793, and the first of January, 1794, respectively, which mortgages and the debts secured thereby, together with all his right and title to the mortgaged premises, Harris assigned to the defendant, on the second of March, 1795, for a valuable consideration. Newall gave bonds for the payment of the several sums so secured by mortgages. The whole amount of rent, which was reserved according to the indenture, and became due during the said term, if the court should be of opinion that the same had accrued, was one hundred and seventy-five pounds, which Newall neither demanded nor received during the term, nor after the expiration thereof. And the interest due on the several sums secured by mortgages was one hundred and ninety-four pounds and eight shillings, which defendant never demanded nor received of Newall. The defendant took possession of the premises on the twenty-ninth of March, 1792, and held the same until March 31, 1797, when, under and by virtue of the mortgages aforesaid, he took peaceable possession thereof, in presence of three witnesses, for breach of the conditions of the mortgages, claiming title under them, in the lifetime of Newall, and held quiet and uninterrupted possession thereof until this day. Neither principal nor interest of the mortgage money has been paid. Newall died in July, 1798.

It was further agreed that, if on these facts, the court should be of opinion that plaintiffs could maintain their action against defendant, judgment should be for the plaintiffs, otherwise plaintiffs should be nonsuited.

F. D. Channing, for the defendant. If it be supposed, that, as to the lease and the first mortgage to the defendant, the lease is prior in time, then must the lease have been merged in the mortgage: 2 Rep. 61; Com. Dig. tit. Surrender, 1; if they are

supposed to be simultaneous, then must the lease have been extinguished at the moment of its creation, *terminus ac foedum non possint constare in una et eadem persona*, if the mortgage is supposed to have been executed first, plaintiffs might have, perhaps, relied on the estoppel, were it not for subsequent conveyances. The second mortgage to defendant carried with it the rent reserved upon the lease, thereby extinguishing the lease: Plowd. 368; Powell on Mortgages, 453; Shep. Touch. 300; *Hilliard v. Sanders*, Winch. 109, 121; Godb. 137. The right of the intestate to the rent was transferred to Harris by reason of the mortgages to him, and the assignment of these mortgages to defendant works an extinguishment of the lease on which the rent was reserved.

Jackson, for the plaintiffs. The two instruments being made at the same time constitute one contract, and it could not be the intention of the parties that the lease should be destroyed immediately upon its creation: *Taylor v. Horde et al.*, 1 Burr. 60, 106. It would be highly injurious to maintain the doctrine contended for by defendant. If the defendant intended to claim the rent by virtue of the second or subsequent mortgages, he should have clearly manifested that intention; he cannot now set up that he was not holding under the lease only. Having elected to take the estate in satisfaction of his debt, he has no right to retain the rents which accrued during the term.

By Court, PARSONS, C. J. This cause has been very well argued by the counsel on each side. The execution of the lease declared on being admitted, and it being agreed that no rent has been paid, the plaintiffs must recover, unless they are barred in consequence of some of the facts disclosed by the case.

The defendant insists that the plaintiffs are barred, because on the same day and at the same time the lease was executed, intestate conveyed to him in fee-simple the premises demised, on condition that the conveyance should be void on payment of one thousand dollars, in five years, with interest to be paid annually, which condition has never been performed; which mortgage, he says, is in law an extinguishment, or at least a suspension of the term created by the lease.

It is generally true that the conveyance of a greater estate, inconsistent with a less estate before granted, shall merge the less estate. But in this case we do not think the rule will apply. It is very clear that when a man, seised of lands in fee, shall mortgage them in fee, if there be no agreement that the mort-

gagor shall retain the possession, the mortgagee may enter immediately, put the mortgagor out of possession, and receive the profits; and if the mortgagor refuses to quit the possession, the mortgagee may consider him as a trespasser, and may maintain an action of trespass against him, or he may, in a writ of entry, recover against him as a disseisor: *Erskine v. Townsend*, 2 Mass. 493, *ante*, 71. But there may be an agreement that the mortgagor shall retain the possession until the condition be broken, which shall bind the mortgagee; in which case the mortgagor may demise the estate to a stranger, and receive the rents to his own use. And, upon the same principle, we are satisfied that the mortgagee, if he consent to take a lease from the mortgagor, and covenant to pay him rent until the condition be broken, shall be bound by his covenant, and shall not be admitted to set up his mortgage against the lease. The demise is in law an agreement that the mortgagor shall retain the possession, and receive the profits to his own use.

To avoid this conclusion, the defendant's counsel would induce the court to suppose that the lease was first executed, and afterwards the mortgage. When different instruments are executed at the same time, but are all parts of one transaction, it is the duty of the court to suppose such a priority in the execution of them, as shall best effect the intention of the parties. As the lease is for five years, and as the money secured by the mortgage was to be paid in the same time, it is apparent that the lease and the mortgage were intended to execute one contract; and to give complete operation to both these deeds, it is reasonable to suppose the mortgage first executed. For if the lease had been first executed, and the mortgage intended to control the lease, no reason can be given why the lease was not in fact surrendered as of no effect between the parties. It is, therefore, our opinion, that the execution of the first mortgage is no bar to the recovery of the rent due on the lease.

The defendant further objects, that if the first mortgage is not a bar, yet the second mortgage made two days after, on his advancing the mortgagor a further sum of money, is in law a bar to the plaintiff's recovery. This objection appears to deserve consideration. In considering it, we may lay the first mortgage out of the case, and suppose the question to arise on a lease made by a man seised in fee, who afterwards conveys the premises to the lessee in fee, on condition that the conveyance be void upon his paying a sum of money to the lessee at a future day. If the lessor, having the reversion in fee, make an

absolute conveyance of the estate in fee to the lessee, without doubt the term is extinguished. If he convey the estate in fee to a third person, the rent shall pass as incident to the reversion; but if he mortgage in fee the estate to a third person, the mortgagee may receive the rent as incident to the reversion, or permit the mortgagor to receive it at his election. If he do not act to show his election to receive the rent, the mortgagor shall recover it of the lessee, who cannot plead the mortgage in bar. But as the mortgagee cannot put the tenant out of possession, if he demanded the rent of him, the tenant must pay it to him; and if, after demand, the tenant shall pay it to the mortgagor, he will pay it in his own wrong.

In the case at bar, the mortgagee is the tenant, and he cannot demand the rent of himself. If he refuse to pay it to the mortgagor, he must be considered as claiming the rent, if by law he may be entitled to it; and this refusal is sufficient notice to the mortgagor.

The legal effect of his reasoning is, that when the mortgagee shall refuse to pay the rent, the rent is suspended until the condition of the mortgage be performed, or the estate be redeemed; and upon either event, the rent will again become payable, if the term has not in the meantime expired. And during the suspension the lessee will, as mortgagee, be accountable for the profits to the mortgagor towards the payment of the debt, first keeping down the interest; and of the value of the profits, the reserved rent will *prima facie* be evidence. If, however, the lessee shall voluntarily pay the rent to the mortgagor, he shall not afterwards be accountable, as mortgagee, for the profits received for the same time.

To confirm this reasoning, let us consider the right of Harris, a subsequent mortgagee, which cannot be better than the right of the mortgagor, which is conveyed to him. As Harris could not put Wright out of possession, he might demand of him the rent. If Wright voluntarily paid it, Harris must account for it with Newell towards the payment of his debt. But Wright might refuse to pay it, claiming the possession under his prior mortgage; and then he must account for the profits to the mortgagor towards the debt. Otherwise the mortgagor, after a second mortgage, might, by collusion with the first mortgagee, receive the rent, and, by not applying it to the discharge of the first mortgage, injure the subsequent mortgagee. For he, by his subsequent mortgage, is, from the time it was made, entitled not only to the possession, but to the profits, against the mort-

gagor, and subject only to the rights of the prior mortgagee. Therefore, if the mortgagor should refuse to redeem, Harris may redeem Wright's prior mortgage; and if Wright had refused to pay Harris the rent when demanded, and had not paid it to the mortgagor, Harris, when he redeems, may compel Wright to account for the profits, as received towards the payment of his prior mortgage.

Upon these principles no injustice is done to the parties, but every equitable allowance is made. If neither the mortgagor, nor any subsequent mortgagee will redeem, the presumption is violent that the land, together with the profits received, is not worth more than the debt and interest due. If it should be worth less, and the first mortgagee should sue the mortgagor to recover the deficiency, in that suit the mortgagor will be allowed not only for the value of the lands when the mortgagee took possession, but also for all the profits he received after possession.

The right of the mortgagee, who had entered under a lease prior to the mortgage, to hold the possession as mortgagee, is admitted by the plaintiff's counsel, if the mortgagee had made his election so to hold; and he insists that the evidence of this election ought to be notice to the mortgagor that he shall no longer hold under the lease; and, further, that no such notice appears in the case, but that it is expressly stated that he did not enter under the mortgages until a time after the term was expired.

The objection that it appears from the case that the mortgagee did not enter until after the expiration of the term, deserves further consideration.

Our statute, granting equitable relief to a mortgagor, provides that he may redeem at any time within three years after the entry of the mortgagee, for the condition broken, in the presence of two witnesses, or by judgment at law. Generally, a mortgagee, when the mortgaged lands, without the profits, is a sufficient pledge for the debt and interest, does not choose to enter and take the profits for which he must account, until after condition broken. His entry then is to compel payment by threatening to foreclose the mortgage. But at the common law, if there be no agreement that the mortgagor retain the possession, the mortgagee has a legal right immediately to enter, and to put the mortgagor out of possession. And this right the statute, fixing the time when the three years shall commence, has never been construed to control. When the mortgagee enters after condition broken, the three years com-

mence on that entry. If he enter before, the three years do not commence until notice by the mortgagee to the mortgagor, after the condition broken, that he shall hold the possession for the breach of the condition.

In the present case, the entry after the condition broken could give Wright no new possession, it being also agreed that he took possession when the lease was executed, and has ever since held the possession. The fair construction of the agreement stated in the case is, in our opinion, that Wright, from the time agreed, held the possession of the mortgaged premises for condition broken, and that he is not concluded, by that agreement, from claiming the possession before that time under his second mortgage.

The counsel for the plaintiffs correctly contends that the mortgagee shall be considered as holding under the lease until he has made his election, and given notice of it to the lessor, to hold under his subsequent mortgage, or done some act equivalent. It is not necessary for us to determine whether the non-payment of the rent when due is alone evidence of this election and notice. The argument for it is that non-payment of money when due is, in law, a refusal. If the mortgagee held under the lease, this non-payment is an unlawful act; but if he held under his mortgage, it is justifiable; and the court ought to presume every act lawful until its illegality is proved. The argument on the other side is, that as he once held under the lease, no mere nonfeasance shall be sufficient to transfer his right of possession to another subsequent title. But we are all of the opinion that Wright's never paying his rent, nor demanding his annual interest during the term, connected with the lessor's never demanding the rent, nor paying any interest, and suffering Wright to enter for the purpose of foreclosing the mortgage, and not redeeming the same, is sufficient evidence of the lessee's election to hold under the mortgage, and of the lessor's assent that he should so hold.

According to the agreement of the parties in the case, the plaintiffs must be called.

Plaintiffs nonsuited.

The authority of this case was recognized in *Draper v. Mann*, 117 Mass. 441; *Smith v. Johns*, 3 Gray, 519; *Wales v. Mellen*, 1 Id. 512, where Metcalf, J., says: "There is no doubt that by our law a mortgagee may take possession and eject the mortgagor, before condition broken, unless there is an agreement between them to the contrary: *Newall v. Wright*, 3 Mass. 155; Rev. Stat. c. 107, sec. 9. Such is also the law of New Hampshire and Maine."

AVERY v. THE INHABITANTS OF TYRINGHAM.

[3 Mass. 160.]

CONTRACT WITH MINISTER BY PARISH.—Where a minister was called at the invitation of a parish and settled over the congregation as its pastor, no agreement being made as to the period during which he was to continue his services, it was held that the contract could not be dissolved at the will of the parish.

PLEADING A PROMISE.—In a declaration in *assumpsit*, the word “promised” is not necessary; any other intelligible word of similar import, as, for instance, “agree,” is sufficient.

ACTION on the case for the salary of plaintiff as minister of the town of Tyringham. The first count in the declaration alleged that the said inhabitants, at a legal town meeting, holden on the twenty-fifth December, 1788, did by a majority vote, agree to call and elect Joseph Avery to the work of the ministry with them in their town; and did at the same meeting further vote and agree that, in case Avery would settle with them and preach the gospel to them, and instruct them in the principles and doctrines of the Christian religion, they would provide him a parsonage and for his support they would pay or cause to be paid to him the sum of seventy pounds annually, in certain enumerated articles of produce; that plaintiff, relying on these votes and agreements of the defendants, did, on January 1, 1789, accept of the call and election, and duly settled with them in the office of the ministry, in Tyringham, and has ever since constantly and regularly continued to carry on and discharge the duties of minister of that town, and has ever since stood and still stands in the relation of pastor to its inhabitants; that the salary for the year of 1803 is in arrear and due to him. There was also a count upon *indebitatus assumpsit*, and another upon *quantum meruit* for the same services.

The cause was tried upon the general issues before SEDGWICK, J., and a general verdict found for the plaintiff.

Defendants then moved for a new trial upon an exception to a ruling of the judge, and in arrest of judgment for insufficiency of the plaintiff's declaration. The exception was to the rejection as evidence of the records of the town, by which it was intended to prove that at a legal meeting, on the second May, 1803, it was voted by a majority of the inhabitants present, that said town would not any longer consider the plaintiff as the minister of the town, and that the plaintiff, on the same day, had notice of the vote. The reasons assigned for an arrest of judgment were that no promise was alleged to have been made,

but merely an agreement among the defendants; that if there was a promise, it was a *nudum pactum*, no consideration being stated.

Hulbert, for the plaintiff.

Dewey and Bacon, for the defendants.

PARKER, J. This action is brought to recover the amount of salary for the year 1803, which the plaintiff claims as the settled minister of Tyringham during that period. The declaration states the invitation of the town to the plaintiff to take upon him that office, and the offer of the pecuniary compensation which they stipulated to pay him towards his support. It then alleges his assent to the propositions of the town, and his settlement in office consequent thereon; his performance of the duties and services of his office, and the arrears of his salary remaining unpaid. These points, as appears from the report of the judge, were all proved or agreed at the trial.

In answer to this demand, the defendants set up a right to discharge themselves from the obligation of this contract at their pleasure; and offered evidence, on the trial, that they had exercised this supposed right by voting in a legal town meeting, that they no longer considered the plaintiff as their minister; which vote was prior to the period for which he claims his salary in the present action. This evidence was rejected by the judge, and the question now before the court is, whether the evidence was or was not rightfully rejected.

The vote in this case was unaccompanied with any cause of complaint. It was, in short, a naked expression of the will of the people to dissolve the connection that existed between them and their minister. Thus the question is brought before us, whether towns and parishes have the right of dismissing their ministers at pleasure, without assigning any breach of duty or immoral conduct against them.

It is not denied that the contract, in this case, was intended by the parties to bind them for some period, longer or shorter. But the defendants contend that there is, by the declaration of rights assured to them, the privilege of putting an end to it at their pleasure. This they infer from the right expressly secured to all societies incorporated for religious purposes, at all times, to elect their public teachers; and they say that without a right to dismiss, they cannot be said to have, at all times, a right to elect. Such a power being inconsistent with the nature of contracts in general, which, being made between two or more par-

ties, cannot ordinarily be dissolved without the concurrence of all, ought to appear very plainly granted by the constitution to receive support in a court of justice.

The constitution, whenever a question arises upon its meaning, must receive such a construction as is reasonable and conformable to its general tenor and spirit. The object of its framers, and of the people who adopted it, with respect to the clause under consideration, unquestionably was to secure to the citizens the liberty of electing pastors whose religious tenets they approved, and to contract with them for their support. The very term contract, used in the constitution, imports something more durable than a mere temporary connection, dissoluble at the will or caprice of either of the parties. It is true, the religious societies are left at liberty to make such contract, and for such term of time as shall be agreed between them and their minister; but the contract once made, it is subject to all such rules of law as govern other engagements. Here no term of time is expressed during which the ministerial connection is to subsist. But, considering the established usage of the country, known to the contracting parties; the nature of the duties to be performed, which peculiarly require permanency in office; the solemnity of the act, which testifies the assent of the minister and his people, it would certainly seem that the connection thus established was to endure for life, unless some stipulation to the contrary should be expressed. Add to this the provision made by our laws for the first settled ministers in new countries, to have a considerable portion of land in fee, and the use of other lands during their ministry, and no doubt will remain that our legislature has always considered the office of a religious teacher durable as his life, unless otherwise provided by the original terms of his settlement, or unless dissolved by a breach of contract on his part, or by a merited loss of that character for purity of morals and Christian virtue, which is essential to the due performance of his sacred functions.

But it is said that the constitution has provided that parishes, etc., shall, at all times, have the privilege of electing their teachers, and that this privilege cannot be enjoyed without the right of dismissing them when they please. This construction is certainly violent, and by no means consistent with the reasonable sense and import of the words. If this doctrine be true, the minister who is settled to-day may be dismissed to-morrow; and thus a connection, which, for the interests, temporal and

spiritual, of both parties, would seem to require stability, would be as uncertain as the tempers or views of the various characters which compose a parish or religious society. How inconsistent this would be with the intention of the parties at the time of making the contract, and how incongruous upon this idea is the term settlement, used by the parties, need not be urged.

The true construction of the words relied upon undoubtedly is, that at all times when a vacancy exists, the people shall have the privilege of electing and contracting with their ministers; they shall not have one imposed upon them by any hierarchy, shall not be subject to tithes, etc., but shall choose for themselves, and pay in their own way.

I cannot, therefore, entertain a doubt that the contract made between a minister and his people, in terms like the one before us, continues for the life of the minister. Whether it may not be dissolved by neglect of duty, immoral conduct, or flagrant unsuitableness of character, need not now be decided, as nothing of this sort is alleged against the present plaintiff. It may not be amiss, however, to observe that the nature of the office implies a contract to preserve an irreproachable character for the moral and Christian virtues; and that whenever gross misconduct or omission of duty shall be proved against a minister suing for his salary, my apprehension is that he will be deemed to have forfeited all rights resulting from the sacred profession he has abused; in addition to which, the people connected with such a minister, by resorting to an ecclesiastical council, a tribunal coeval with the settlement of our country, will be sure to find a remedy, by the removal of a man who has given them reasonable cause of disgust. I am of opinion, in the case before us, that a new trial ought not to be granted.

As to the motion for arresting the judgment, the declaration does not appear to me so defective as to be insufficient to support a judgment after a verdict. All the facts necessary to ground a promise upon are contained in it; the formal words of a promise only are omitted. However this objection might have prevailed upon a special demurrer, I am against receiving it as a cause for arresting the judgment upon the verdict in this case.

SEDGWICK, J. Considering the great importance of the question agitated in this cause, if it were possible for me to entertain a doubt respecting its merits, I should be disposed for a continuance of the action for advisement and consideration;

but having my opinion clearly settled, and apprehending that great confusion and mischief would follow from the courts delaying to render judgment, if the public should conceive such delay owing to a doubt or hesitancy in their minds, I think it expedient to express an opinion at this time, and hope that our decision will put the question at rest.

Before the trial of this cause, I had never conceived that a contract, such as is declared on in this case, was a contract at will. Indeed, it was at the trial that, for the first time, I heard such an opinion suggested. But that suggestion did not, at the time, impress my mind with any force, nor have the arguments of the defendant's counsel, although very ingenious, had a greater effect.

This was a contract made and entered into between a Congregational minister and the inhabitants of a town, constituting, in this case, one parish. It appears to me to have been made and conducted in the forms usual in such cases in our country. The church call the minister; the town, at a legal meeting, concur in the invitation, and vote the salary; the minister, after solemn consideration, accepts the invitation; at the time appointed he is set apart to his office, according to the forms of that religious sect to which the parties belong; and in this case it is agreed that he continued faithfully to exercise and perform the various duties of his office, and particularly during the term for which he demands his salary. None of these facts are contested by the defendants.

But the defendants offered on the trial to give in evidence a vote of the town, passed previously to the performance of the services declared for, in which they resolved, but without stating any reasons, that they would no longer consider the plaintiff as their minister; and they also offered to prove that they gave notice seasonably to the plaintiff of this procedure. This evidence was rejected by the judge at the trial, and the question now to be decided is, whether that rejection was, or was not, legal and proper. If it was right, judgment ought to be entered according to the verdict; if it was wrong, a new trial ought to be granted.

The counsel for the defendants contend, in effect, that the office of a minister, about whose invitation and settlement such solemn deliberation and formality were had, is an office determinable at the pleasure of the minister or people; or that, at most, it is an office to be holden from year to year. They agree that by the laws and usages of the country, previous to the es-

establishment of our state constitution, a minister, thus elected and ordained, held his office, with all its rights and privileges, during his life; unless the contract was sooner dissolved by the mutual consent of the parties to it, or by such misconduct of the minister as in some way consistent with the discipline of the sect to which he belonged, should have the same effect. It is impossible to hold any other opinion on this point, from a bare perusal of the statutes of the former province of Massachusetts Bay, relating to the subject. But, in further confirmation of the opinion, four unanimous decisions of this court are now recollected. These decisions were, it is true, applied to contracts made before our state constitution; and that now under consideration was entered into at a period since.

And it has been strongly insisted and relied upon, in behalf of the defendants, that the constitution has virtually repealed the pre-existing laws; and the third article of our declaration of rights, which gives to towns, etc., the right at all times of electing their teachers, and contracting with them for their support, has been urged upon the attention of the court, as conferring also a right, at all times, to create a vacancy, as necessary to the exercise of their right of election. But can this be the true construction of that article? The legislature, by declaring that ministers, as soon as they are settled, shall be considered as inhabitants of the towns where settled, and entitled to all the rights and privileges of such inhabitants, have given an explanation of this article by no means consistent with that contended for on the part of the defendants. They must have thought the office to have a greater permanency than a mere tenure at will, to annex to it rights not acquired in ordinary cases, but by a considerable residence. It is worthy of observation that the mode of settling ministers has continued in every respect the same since the establishment of the constitution as it was before. It is a pretty general practice in the country, on the introduction of a minister to the charge of a parish, to give him, besides the annual salary agreed on, an estate in land in fee, or in lieu of a sum of money adequate to the purchase of a place of residence. Public provision has also been made by government appropriating a lot of land, besides the parsonage, to the first settled minister of newly-settled towns in fee. These facts operate very strongly, in my mind, to show the public and general impression in the country that a settlement of a minister, under a contract for an indefinite period, is a settlement for life. Indeed, they show the absurdity of a construction

which gives to the minister a right to dissolve the contract, as soon as these grants are vested in him. And if the contract is dissoluble at the pleasure of one of the contracting parties, it must be equally so at the pleasure of the other. The consequences resulting from such a doctrine, would be mischievous in the extreme. Mankind are capricious even in the most serious concerns. Would ministers who regarded the comfort of their families, or their own personal quiet and security, be willing to make a contract on such terms?

The anxious regard which the framers of the constitution have displayed for the public religious instruction of the people, most effectually negatives a construction of that instrument, which reduces the security of a minister for his salary below that which a laborer has for his bargained wages. This instrument has given, or rather reserved, to the people the power of making contracts with their public instructors; what is there then that shall invalidate those contracts? It is said to be impossible that the people should have "at all times" the power of contracting anew, unless they have power to dissolve and annul an existing contract; or, in other words, to break it at their pleasure. The same mode of reasoning would apply to any other contracts. A man has by law an absolute right to dispose of his property or his services at his pleasure; but having, in any supposed case, exercised that right, his power is so far restrained, as the other party is interested in the subject of the contract. If he has made a disposition of his property, it is no longer his to contract about, and this is equally true in a contract for future labor or service. He can make no future engagement, which would impair the rights of a party with whom he had previously contracted. So far is the constitution from establishing the construction contended for by the counsel for the defendants, that it irresistibly implies directly the contrary conclusion. Let the second and third articles of the declaration of rights for this purpose be candidly and impartially considered, and the intention of those who framed, and of those who adopted and ratified that instrument, so far as respects our present purpose, cannot be doubted. In language strong and energetic the religion of Protestant Christians is established. Liberty of conscience is secured. Provision is made for the support and maintenance of public Protestant teachers of religion and morality. The exclusive right of electing their public teachers, and of contracting with them for their support and maintenance, is guaranteed to religious societies;

and it is made their duty at their own expense to make suitable provision for the institution of the public worship of God. After all this, it cannot reasonably be believed that the constitution has prohibited the making of a contract by the parish with a minister for his permanent settlement and support; because it would be impossible, with such a construction, to obtain the important objects so explicitly declared. And it is most manifest, as has been already suggested, that in our statutes there is the strongest implied legislative construction that a minister has stability, in the tenure of his office, beyond that contended for in the present instance; and I have no doubt that generally, and I believe universally, since the adoption of the constitution, the same construction has been practically adopted by parishes in their contracts with their ministers.

In this case it is unnecessary precisely to determine the nature of the tenure which a minister, circumstanced as the plaintiff in this case is, has in his office; whether it be for life determinable for sufficient cause, by an ecclesiastical council, or in any other mode recognized by law; or whether only for misbehavior, or how that misbehavior is to be ascertained. It is unnecessary to determine all the questions which would be comprised under so extended a view of the subject; for if the contract here be not a contract merely at the will of the parties, or at most a hiring from year to year, it is agreed that the plaintiff ought to recover. And whence is it to be collected that such is the nature of the contract?

It has already been proved that, by the constitution, the parties are not restrained from making a contract of permanent stability. What, then, was the meaning of the parties to this contract, apparent from their language and conduct? Is there anything expressed or implied in the vote of the town, by which it can be understood that the intention of the defendants was as they now contended. Let any man of sound mind reflect on the terms in which the defendants have expressed their meaning by their votes; their deliberations as to the previous vote of the church; their agreement to settle the plaintiff as their minister; their guarding the public ministerial land; and providing for a permanent equalization of the annual salary, by placing it on the basis of the prices of specific articles, and determine whether it is possible that they thought they were forming a contract, which was to endure as long as, and no longer, than the pleasure of either party; and whether that pleasure should depend on the exercise of a well directed dis-

cretion, or on whim and caprice. What was the understanding of the plaintiff? This may be learned from the serious deliberation with which he contemplated the proposition of the defendants, and the solemn and impressive language in which he expressed his acceptance of it. From a deliberate consideration of the language of the parties, it is impossible for me not to conclude, and with the most perfect satisfaction, that neither party supposed that the continuance of the contract was to depend on the pleasure of each other respectively, or that it was no more than a hiring from year to year. Nor is there, in my opinion, anything in the nature of the relation between these parties which should lead to such conclusion, but the contrary. If these contracts are merely at the will and pleasure of the parties, would it not diminish much of that respect and reverence with which it is desirable that the clerical character should be viewed by the people? And on the part of the minister, must not a consciousness of dependence on the mere pleasure of the people affect that firmness of mind which is essential to an impartial and effectual reproof of vice and immorality? And in such a state, with what prudence could the minister form a permanent connection which might be important to the comfort and happiness of his life? I should have deeply lamented, if I had found myself bound to give a different construction to the constitution; but I am pleased to have it in my power to declare that I have not a particle of doubt on the subject. As to the motion in arrest of judgment, it is not necessary to determine whether this declaration would have been good on special demurrer. The material facts are all substantially alleged. It is true that in *assumpsit* the declaration must allege a promise, and a sufficient consideration. This was the point in the case cited from Lord Raymond, and in other cases mentioned at the bar. But it is not necessary to use the word promise; any other intelligible word or expression conveying the same idea (as "agree," in the case at bar), will serve the purpose.

In this declaration the promise is, in my opinion, laid with such certainty, that after verdict the judgment ought not to be arrested.

PARSONS, C. J. In this cause, after a verdict for the plaintiff, the defendants move for a new trial, and also in arrest of judgment.

On the motion for a new trial, we are called upon to decide a question of the first importance to the good order and peace of

society, and to the best interests of our fellow-citizens. The defendants' counsel insists that a congregational minister of any parish, regularly called, ordained and settled according to the ancient usages of the country, and faithfully executing the duties of his office according to his capacity, holds his office at the will of his parish, who may remove him at their pleasure. The plaintiff's counsel contend that he holds his office for life, determinable on sufficient cause exhibited and proved before a proper tribunal. If the office be holden at will, the evidence rejected ought to have been admitted, and the action must be sent to a new trial, otherwise the verdict must stand.

It is a general rule that an office is holden at the will of either party, unless a different tenure be expressed in the appointment, or is implied by the nature of the office, or results from ancient usage. A consideration of the nature and duties of the ministerial office is important in determining its tenure. It is the duty of a minister to adapt his religious and moral instructions to the various classes comprising his congregation. He ought, therefore, to have a knowledge of their situation, circumstances, habits and characters, which is not to be obtained but by a long and familiar acquaintance with them.

Vice is to be reproved by him in public and private; and the more prevalent and fashionable are any bad habits the more necessary is it for the faithful minister to censure them and to rebuke those who indulge them. But if it be a principle that his office and support depend on the will of his people, the natural tendency of such a principle, by operating on his fears, will be to restrain him from a full and plain discharge of his official duties. And it may be added, that the same principle by diminishing his weight and influence, will render his exhortations and rebukes unavailing and ineffectual. And as it cannot be for the interest of the people to hold a power probably dangerous and certainly inconvenient to themselves, I cannot believe that a tenure at will, whence this power results, can accord with the nature and duties of the office. And it may be also observed that if the tenure of his office be at will, a minister, after a life of exemplary diligence in the exercise of his official duties may, when oppressed with the infirmities of age, be removed from office and be dismissed to poverty and neglect. A consequence of this power in a parish will be the deterring of young men of information and genius from entering into the clerical profession, and devolving the public instruction in religion and morals on incompetent persons without talents,

education or any suitable qualifications. Thus an office, which, to be useful, ought to attract our respect and veneration, will be the subject of general contempt and disgrace. And an effect of this kind, surely every good citizen would wish the laws to prevent, so far as the laws may have power. But considerations of irresistible weight result from the ancient usages established by our pious ancestors, and wisely continued to this day.

In the settlement of a minister the parish invite some candidate to preach on probation, that they may have an opportunity to judge of his qualifications, and that he may have some knowledge of the state, temper and principles of the people. If a settlement be agreed upon by both parties, it is the general practice of parishes not having parsonages to grant a sum of money or other property to the minister, exclusive of his annual salary, which is emphatically called his settlement. This name was derived from the uses to which it was intended the money should be applied by the minister. With it he usually purchased in his town some domicile, where he might have a permanent abode among his people, and be conveniently situated to attend to all the duties of his office.

But if the tenure of his office be at will, it is unquestionably at the will of either party. The minister, therefore, if the parish can remove him at their pleasure, may, at his own pleasure, immediately after he has availed himself of the grant, abandon his office and carry away his settlement, to the great loss and damage of the parish. The usage of granting a settlement is satisfactory evidence that the tenure of his office is not at will, but that the ministerial relation must continue until it be dissolved for good cause.

As an encouragement to settle ministers in new towns, where the property of the inhabitants is not large, the practice of granting permanent settlements has been long confirmed by grants from the former provincial legislature and from the general court of the commonwealth. When new townships are sold, two rights are reserved by the government; one as a parsonage for the minister and his successors, and the other for the absolute use of the first-settled minister and his heirs. Unwise, indeed, and negligent, must have been the legislature in making this charitable provision, if the first minister, soon after his settlement, might resign his office at his own will and retain for himself and his heirs the fruits of the public beneficence.

But in forming my opinion I am not confined to inferences drawn from the practice of towns or parishes in the settlement

of ministers, or from the intent of legislative grants. Before and since the revolution this question has been considered by the courts of law in many actions sued by ministers for the recovery of their salaries. And it has been the uniform opinion of all the judges who have successively filled the bench of our highest judicial court, that when no tenure was annexed to the office of a minister by the terms of settlement, he did not hold the office at will, but for life, determinable for some good and sufficient cause, or by the consent of both parties; and many cases have been mentioned where this opinion was declared. And no case has been produced or referred to by the counsel for the defendants, where a different opinion has been given.

The counsel for the defendants have contended that, admitting the contract of settlement before the revolution, was not at will, the constitution has altered the law; and that now the tenure of the minister must be at will. The part of the constitution relied on, is the provision in the third article of the declaration of rights, which secures to towns, etc., the exclusive right at all times of electing their public teachers, and of contracting with them for their support and maintenance. The argument is in this form: a town shall at all times elect its public teacher; but if, after one be elected, the town cannot remove him at pleasure, then there will be a time when the town cannot elect a public teacher, the office being full. This argument certainly will prove much. If the town, in the election of a public teacher, contracts with him for a certain number of years, by this construction it must have a right to break its contract solemnly made. A conclusion so unreasonable and unjust, it is supposed, the counsel for the defendants are not willing to admit. The fair and natural construction of this provision is, that a town, etc., shall at all times, when it has no public teacher, have the exclusive right of election, but no right to violate its own contracts solemnly and deliberately made.

This article of the constitution has, without doubt, made some alteration in the ecclesiastical establishment of the state. Under the colonial laws the church members in full communion had the exclusive right of electing and settling their minister, to whose support all the inhabitants of the town were obliged to contribute. And when the town neglected or refused suitably to maintain the minister, the county court was authorized to assess on the inhabitants a sum of money adequate to his support. Under the colony charter no man could be a freeman unless he was a church member, until the year 1662; and a

majority of the church constituted a majority of the legal voters of the town. After that time, inhabitants, not church members, if freeholders, and having certain other qualifications, might be admitted to the rights of freemen. In consequence of this alteration a different method of settling a minister was adopted under the provincial charter. The church made the election and sent their proceedings to the town for their approbation. If the town approved the election, it also voted the salary and settlement. When the candidate accepted, he was solemnly introduced to the office by ordination, and became the settled minister, entitled to his salary and settlement under the votes of the town. If the town disapproved and the church insisted on its election, it might call an ecclesiastical council; and if the council approved the election, the town was obliged to maintain the person chosen as the settled minister of the town by the interference of the court of sessions, if necessary; but if the council disapproved, the church must have proceeded to a new election.

By the constitution the rights of the town are enlarged, if it choose to exercise them, and those of the church impaired. If the church, when their election has been disapproved by the town, shall unwisely refuse to make a new election, or the town, for any cause, shall abandon the ancient usages of the country in settling a minister, it may, without or against the consent of the church, elect a public teacher, and contract to support him. And such teacher will have a legal right to the benefit of the contract, although he cannot be considered as the settled minister of the gospel, agreeably to the usages and practice of the Congregational churches in the state. An adherence to these usages so manifestly tends to the preservation of good order, peace and harmony among the people, in the exercise of their religious privileges, it may be presumed that a departure from them will never be admitted by any town but in cases of necessity.

It has been objected that a minister holds his office at his own will, because his town have no legal remedy if he abandon his office, and, therefore, that he should also hold at the will of the town. The conclusion is certainly just, if the premises were correct. But a minister does not hold his office at his own will; and if he abandon it without cause, and without the consent of his town, the inhabitants may recover at law such damages as they have sustained by his injurious conduct.

In Cumberland, before the revolution, Mr. Wiswall, a settled

minister of the parish of New Casco, in the town of Falmouth, left his parish without its consent, and was ordained over the Episcopal church in that town. The parish brought an action against him to recover damages for his leaving his office. There was no objection made by the court, or the defendant's counsel, to the action as not lying in such case; but the cause went off from a variance between the declaration and the contract of settlement.

It is further objected that the minister ought to hold his office at the will of either party, because there is no jurisdiction competent to declare when the office is forfeited, or when the contract may be dissolved; and that the custom of applying to an ecclesiastical counsel may be rendered nugatory by either party refusing to concur in the appointment.

This objection deserves a particular consideration. It is the duty of a minister to teach by precept and example. If his example is vicious, he is worse than useless. Immoral conduct is then such misfeasance as amounts to a forfeiture of his office. I do not mean to include mere infirmities incident to human nature, and to which a habitually good man is sometimes liable. Negligence also, or a willful and faulty neglect of public preaching, or of administering the ordinances, or of performing other parochial duties, is such a non-feasance as will cause a forfeiture of the office. In either of the cases, or in both, the town may, at a legal meeting, declare the office forfeited, assigning in their votes the causes of the forfeiture, and of their dismissal. If the minister do not resist, no further question will arise; if he still claim the office, and sue for his salary, the charge made by the town, as creating a forfeiture, are questions of fact properly to be submitted to the jury. If they find the allegations true, the minister will not be considered as holding his office after the vote of dismissal. If the allegations are false, justice requires that he shall recover his salary. These allegations the jury are competent to inquire into, and on such inquiry ultimately to decide. And doubtless they would be as willing to relieve a town from the burden of supporting a vicious and unworthy minister, as they would to aid an exemplary and faithful one in recovering his stipulated salary.

There are also objections to a minister founded in questions of doctrine and discipline. A town may sometimes desire a dissolution of the ministerial contract, from its impoverishment, by a great part of its inhabitants annexing themselves to other denominations of Christians, or from other causes. A minister

may also desire his dismissal from various causes. In all these cases, therefore, and also on charges of immorality and neglect in the minister, the parties, if they cannot agree to dissolve the contract, may call to their assistance an ecclesiastical council mutually chosen; and their advice, technically called their result, is so far of the nature of an award made by the arbitrators, that either party conforming thereto will be justified. If, in a proper case for the meeting of an ecclesiastical council, to be mutually chosen, either party should, unreasonably and without good cause, refuse their concurrence to a mutual choice, the aggrieved party may choose an impartial council, and will be justified in conforming to the result.

Thus a reasonable tribunal is established to decide on all cases of difficulty and controversy between a minister and his people; a tribunal founded in ancient usage, resorted to in practice, and probably in many cases, but certainly in one case in which I was counsel, supported by the opinion of all the judges of the supreme judicial court. In the case of *Fuller v. The Inhabitants of Princeton*, the inhabitants had charged the minister with opposition to the independence of the United States, and with hostility to the principles of the revolution, on the success of which depended the preservation of our civil and religious privileges. They stated that they had requested Mr. Fuller's concurrence in the choice of a mutual council; that he unreasonably refused his concurrence; that thereupon they called an *ex parte* council, who advised to the dismissal of their minister; and that they had dismissed him accordingly. Mr. Fuller contended that he was always willing to submit the controversy to a mutual council. On this point evidence was given on both sides. The court, in their direction to the jury, instructed them that if they were satisfied that the town had offered Mr. Fuller a mutual council, and he had unreasonably refused to agree to one, then the town was justified in proceeding conformably to the result of an *ex parte* council. But if they were satisfied that Mr. Fuller had always been willing to submit the controversy to the result of a mutual council, then the result to an *ex parte* council, and the proceedings of the town pursuant to it, were, in law, a nullity.

Upon the whole view of the subject, I am entirely satisfied that the conduct of the judge excepted to was perfectly right. I see no reason for arresting the judgment after verdict, for though there are some informalities in the declaration, it appears there was a good cause of action. A title defectively set

out is good after verdict, but not a title which, in itself, appears defective.

The whole court concurring, there can be no new trial, and judgment must be entered according to the verdict.

The nature of the contractual relation between a minister and his congregation is here thoroughly discussed, and here we have the principles determined which should control civil courts in their examination of questions of this nature. The elaborate and solemn examination given to this case has made it one of our leading American cases on this subject. The doctrine of the case has since, in this country, been repeatedly affirmed. The case is cited and its authority recognized in *Whitmore v. Fourth Cong. Society*, 2 Gray, 308; *Sheldon v. Congregational Parish*, 24 Pick. 286; *Stearns v. First Parish*, 21 Pick. 125, where it is explained; *Ex parte Hennen*, 13 Pet. 260. In *Gibbs v. Gilead Society*, 38 Conn. 153, the doctrine is affirmed. There it is held that a contract of this nature is one for life, unless otherwise expressed; but the contract sanctioned and made operative according to the rules and usages of the denomination creates a pastoral relation, which may be severed for cause by the formal action of the congregation, and upon such severance pursuant to the polity of the denomination, the contract ceases to be operative. The doctrine is recognized in *Worrell v. Church*, 23 N. J. Eq. 96. The church, in that case, owned a mortgage upon the minister's residence. Difficulties having taken place between the pastor and the people, it was agreed they would release the mortgage if he would resign. Acting on this agreement, he did resign, and it was held that his resignation, being a voluntary act, was a sufficient consideration to support the promise to release the mortgage. In *St. Clement's Church case*, 8 Phila. 251, an injunction was granted restraining a vestry from ejecting a rector from his parish without a formal trial in accordance with the canons of his church. The court, in an elaborate discussion of the case, said: "Can it be possible that any minister may be summarily ejected from his parish without a trial? Shall the law guarantee to the humblest citizen a hearing, and may an ordained and duly instituted minister be denied a right as common as this one? * * * I am of opinion that under the existing laws of the church, the civil contract cannot be broken without an accusation and trial."

The latest decision on this question is *Perry v. Wheeler*, 12 Bush, 541, decided by the Kentucky court of appeals in January, 1877. The opinion of Lindsay, C. J., examines at length many of the leading cases in reference to church law and contracts, and the nature of the jurisdiction of ecclesiastical tribunals. It will be one of our most instructive cases on this head. There Perry was called to the rectorship, and the engagement was effected by the following letter from the vestry:

"Hopkinsville, Ky., Sept. 1, 1867.

"REVD. G. B. PERRY, D.D.:

"Dear Sir: By the unanimous vote of the members of Grace Church, Hopkinsville, taken at a meeting held on Thursday last, the vestry were authorized to submit the following to your consideration:

"Be it resolved, and hereby it is resolved, that the Rev. G. B. Perry, D.D., be, and is hereby, elected permanently to the rectorship of Grace Church, Hopkinsville, at a salary of _____ dollars per annum, to be paid quarterly, each quarter respectively, in advance, with the free use also of rectory grounds, as soon as vacated by present occupant.

“ ‘ Resolved, that said blank in regard to salary be hereafter filled.’ ”

“ In submitting the above, allow me to express the hope that we may be placed at an early date in possession of a favorable reply.

“ Very respectfully, JAS. WALLACE, Senior Warden.”

In reply, Dr. Perry signified his acceptance, and entered thereafter in charge. Subsequently his salary was fixed at six hundred dollars per annum; but in August, 1871, a resolution was adopted by the vestry fixing his salary for the year ending September 1, 1872, at a sum not less than five hundred dollars. This resolution produced a controversy, the result was that under the laws of the Episcopal Church application was made by the congregation to the bishop for a board of reference, either to settle the controversy, or fix terms of dissolution of the pastoral relation. The board was appointed, and it determined that a dissolution was expedient, and stated the terms on which it should be made, and arranged for a settlement of the amount due him, allowing him the use of the rectory and grounds up to June 1, 1872. The action of the board was approved by the bishop. Perry refusing to be bound by the action of the board, the bishop suspended him, exercising clerical functions within the diocese. Perry, in 1875, filed a petition, claiming that the church was indebted to him for salary and arrears in the sum of three thousand dollars, and seeking to have the rectory and grounds subjected to the payment of his claim. The church made a counter-claim for the use and occupation of the rectory. The cause was submitted and a judgment rendered requiring him to surrender the rectory and grounds, and setting off rents against the sum awarded him by the board of reference, and dismissing his petition. From this judgment he appealed. Various questions were passed upon in the case; for the purpose of this note we only notice what is said regarding the contractual relation. Referring to this point the court say: “Appellant, by his counsel, insists that he was the *permanent* rector of Grace Church, and had the right to retain his position during life, unless he should become incapacitated for the performance of clerical duties by age or disease, or unless he should disqualify himself by immoral or unchristian conduct, or by the abandonment of the faith and the practices of the Protestant Episcopal Church. He certainly was elected permanent rector; but we do not understand the term ‘permanently,’ as used in this case, to mean that the parties were to be bound together by ties to be dissolved only by mutual consent, or for sufficient legal or ecclesiastical reasons. A connection of that character might, and in some cases probably would, result in compelling an unwilling pastor to remain with his congregation, or a dissatisfied congregation to retain and pay an unpopular and distasteful minister after the feeling of estrangement had become so intense that the continuance of the pastoral relation would tend to tear down and destroy rather than to preserve or build up the cause of Christianity, and the moral and religious interests of the local church. We understand that Dr. Perry was called as the rector of the church for an indefinite period, and that it was intended he should continue to hold the place until one or the other of the contracting parties should desire to terminate the connection, in which case the dissatisfied party was to have the right to be relieved of further obligations to the other, upon fair and equitable terms, and after reasonable notice, and with the concurrence or approval of the ecclesiastical authority of the diocese.”

BOYNTON v. KELLOGG.

[3 MASS. 189.]

BREACH OF PROMISE—EVIDENCE OF PLAINTIFF'S CHARACTER.—In an action for a breach of promise of marriage and for seduction, the defendant cannot give evidence of the plaintiff's general bad character between the time of the promise and the breach, in mitigation of damages.

ACTION on the case for a breach of promise of marriage and for seduction, and the general issue pleaded. The promise by the defendant, and the breach thereof were proved, and defendant then gave in evidence the circumstances, conditions and age of the respective parties, together with evidence of instances of the misconduct, impropriety, and indelicacy of the behavior of the plaintiff, as well before as after the defendant's promise, and before the breach of it. On this portion of the evidence, the judge charged the jury: 1. That if the woman was of bad character at the time of the contract, and it was unknown to the defendant, the verdict ought to be in his favor; 2. That if the plaintiff, after the promise, had prostituted her person to any other than the defendant, she thereby discharged the defendant; 3. That if her conduct was improperly indelicate, although not criminal, before the promise, and it was unknown to the defendant, it ought to be considered in mitigation of damages; 4. That if such was her conduct after the promise, it was proper, in the same view, for the consideration of the jury. It also appeared that the parties had lived within a few miles of each other from early life, and for some time prior to the promise, in the same neighborhood; and that a personal intimacy had existed for a considerable period before the promise.

Defendant's counsel offered to prove a general bad character of the plaintiff for chastity, between the time of the promise, and before the breach of it; but the evidence was rejected, the judge being of opinion that it was inadmissible either in mitigation of damages or as a bar. After a verdict for the plaintiff, defendant's counsel moved for a new trial, assigning as a reason the rejection of evidence offered.

Dewey, Thayer and Hulbert, for the defendant, contended that the evidence should have been received, as the character of the plaintiff was the point in issue: *Foulkes v. Sellway*, 3 Esp. 236; and that it was not material whether the lewdness suggested was before or after the promise.

Attorney-general Bidwell and Whiting, for the plaintiff, were stopped by the court.

PARKER, J. The opinions held by the judge in the trial of this cause were very liberal. It appears that the defendant was permitted to give in evidence any instances of misconduct, and even of indelicacy, in the plaintiff; and that failing to produce proof of any such instances, his counsel desired to go into an inquiry respecting her general character. This was in my opinion very properly denied. It appears, from the declaration in this case, that the plaintiff had been seduced by the defendant, and that pregnancy was the consequence of the seduction. This, of itself, would degrade her in the estimation of the public; and the defendant wishes to avail himself of this degradation, a consequence of his own misconduct, to avoid the plaintiff's action, or to reduce the sum she may recover in damages. No argument can show the absurdity of such a proposal in a stronger light than a bare statement of it. A gentleman, under pretense of courtship, pursues a lady to seduction, leaves her to suffer the pain and ignominy which necessarily follow, and when she appeals to the laws of her country for a pecuniary satisfaction, even that, inadequate as it is, is to be resisted or reduced by urging her ignominy as a reason why she should not recover. To permit such a defense would be a reproach upon the administration of our laws. I am against a new trial.

SEDGWICK, J. It does appear to me that the defendant had every reasonable indulgence at the time. To go further, and permit evidence of the plaintiff's general character, injured and degraded as it necessarily was by the treatment she had received from the defendant, would be placing the other sex absolutely in the power of ours. It is not to be endured that a man should seduce a female and ruin her character and standing in society, and when she comes to ask compensation for the injury under which she is suffering, avail himself of her humiliation and disgrace to diminish her claim of damages. I am decidedly against granting a new trial.

PARSONS, C. J., concurred, and observed that the doctrine laid down by Lord Kenyon, in the case cited for the defendant, was good law. In common cases, where character is in issue, undoubtedly evidence of the public opinion is to be received.

The only point decided in the case at bar is, that when, after a promise of marriage, a woman is seduced and deserted by her lover, in consequence of which she acquires a bad character, he

shall not be permitted to avail himself of that character in mitigation of the damages, in an action brought by her for the injury arising from the breach of this promise to marry her.

Judgment according to the verdict.

See *Johnson v. Caulkins*, and note, 1 Am. Dec. 102.

FIRST MASSACHUSETTS TURNPIKE CORPORATION v. FIELD.

[3 Mass. 201.]

BAR TO STATUTE OF LIMITATIONS.—A fraudulent concealment by the defendant that a cause of action had accrued to the plaintiff, is a good replication to a plea of the statute of limitations, and is sufficient in law to avoid the plea of the statute.

ASSUMPSIT. The declaration contained two counts. The first stated that the defendants contracted with the plaintiffs to make and complete a turnpike road between two certain points, in a specified time and manner, and then alleged that defendants proceeded to make the road, but did not complete it agreeably to their contract. The second count was *indebitatus assumpsit* for money had and received.

Non assumpsit and the statute of limitations were pleaded to both counts. Issue was joined on the first plea; and as to the second, plaintiff replied that the defendants did the work fraudulently and deceitfully, so that much time elapsed before the breach was discovered, but that the action had been commenced within six years after the discovery of the fraud; that defendants had so executed the work that the contract appeared to be completed, and they falsely and fraudulently affirmed that they had completed the contract, whereupon plaintiffs paid them the money mentioned in the second count, that the fraud was not discovered until a long time after this payment, and that the action was commenced within six years after the discovery of the fraud.

To these replications the defendants demurred.

Ashman and Upham, for the defendants, contended that the replications were a departure from the declaration; that if plaintiffs had intended to rely on the fraud set forth in their replications, they should have stated it in their declaration or brought an action for deceit.

Hooker and Bliss, for the plaintiffs, urged that these were no more a departure than any replication which goes to avoid the defendants' plea; that they were not bound to anticipate the plea by declaring that defendants had been guilty of a fraud, for that would take the case out of the statute; and contended that the principle on which such replications were founded had been recognized in *Bree v. Holbech*, 1 Doug. 645; *The South Sea Company v. Wymondsell*, 3 P. Wms. 143; Esp. Dig. 151; Com. Dig. Action upon the case upon *assumpsit*, H. 5.

PARKER, J., said that not having been present when the cause was argued, he had some hesitation about giving an opinion; but that having read the papers in the case with attention, and conferred with his brethren, and having seen the opinion which the chief justice was now about to deliver, he concurred entirely in that opinion. His honor added that he thought the case of *Bree v. Holbech* strongly in point, and that the reasoning of Lord Mansfield applied very closely to this cause.

SEDGWICK, J., said that since the argument in this case he had paid attention to it, and had prepared himself to deliver an opinion; but he had, perhaps unfortunately, left his note of the case at his home. He did not, however, on this account, wish the judgment of the court should be delayed; for his own opinion was too firmly fixed to be shaken by any further argument or consideration. His honor then stated the substance of the declaration and pleadings, and proceeded as follows:

The question referred to the court by this record is, whether the demand of the plaintiffs, which appears to be most just and equitable, is barred by the statute of limitations. He said he should have been unhappy to have found that the defendants could have availed themselves of the defense which they had set up. He was, upon investigation, satisfied that this was not the case. There was nowhere anything to be found which gave the least countenance to it. On the contrary, the case of *Bree v. Holbech* strongly implies that the principle on which the plaintiffs in this case rely is correct. He said he remembered to have found a case in P. Williams, which he thought directly in point. And he was persuaded that he had found another case to the same purpose, but he did not remember either the reporter, or the name of the case. In his opinion, nothing short of very stubborn authorities, on the part of the defendants, could justify a judgment in their favor, and none at all are shown.

On principle there can be but one opinion. In this the moral sense of all mankind must concur. The defendants undertook to perform a piece of business for the plaintiffs, and were paid for it. In the performance of their contract they acted fraudulently and deceitfully, to the detriment of the plaintiffs. Upon the discovery of the fraud, and within the time limited for bringing this species of action, the plaintiffs demand redress of the wrong which they have received. By the pleadings, all this is acknowledged by the defendants; but they say the plaintiffs cannot recover, because more than six years have intervened since they received the plaintiffs' money, and since they completed the road in the manner in which they made it. Is this an answer which ought to be deemed satisfactory in a court of justice? I think not. If it should, every man would be screened from making satisfaction for injuries resulting from the fraudulent execution of his contracts, if his fraud was attended with such circumstances of artful concealment as to elude detection until after a lapse of more than six years.

No one can doubt the plaintiffs' right to recover against the defendants for the injury they had sustained; and the only question is, whether they can recover in this form of action, or must be compelled to resort to their special action on the case for the fraud. The one action is as much as the other within the statute of limitations. If the plaintiffs had commenced an action expressly for the fraud, it could not have been maintained, unless the discovery of the fraud was within six years before the commencement of the action. In this case the evidence must be the same. In both it is saying only that the defendants shall not take advantage of their own wrong to injure the plaintiffs. In this case, by proving the fraud, it is proved, in fact, that the defendants did not perform their contract. And the action is brought within the time by law allowed for that purpose, computing from the moment when the plaintiffs knew that they were entitled to it; and the only reason why it was not earlier known, was the fraudulent conduct of the defendants, of which they ought not to be permitted to avail themselves.

PARSONS, C. J. To support those replications, it must be competent for the plaintiffs to avoid the statute of limitations by replying fraud in the defendants; and the replications must disclose a fraudulent transaction in the defendants, by which the time, when the cause of action accrued, must have been fraudulently concealed from the knowledge of the plaintiffs until

a period within six years before the action was commenced. The statute of limitations is a beneficial statute, when applied according to its true principles. It was made to prevent the delay of bringing suits so long that the defendant might have lost the evidence necessary to his defense. His witnesses may be dead, or absent, or their memories may fail, or his vouchers may be lost or mislaid. It was not the design of the statute to deprive a man of his just right because of his indulgence in delaying to support that right by a suit at law. If, therefore, in an action of *assumpsit*, the defendant has acknowledged within six years, directly or indirectly, that the plaintiff's demand is just, this acknowledgment shall take the action out of the statute, upon the construction of law that such acknowledgment is evidence of a promise made within six years.

Neither can the statute be considered as intending to protect any man in the quiet enjoyment of the fruits of a fraudulent execution of a contract, if the action be commenced within six years after the discovery of the fraud. The delay of bringing the suit is owing to the fraud of the defendant, and the cause of action against him ought not to be considered as having accrued until the plaintiff could obtain the knowledge that he had a cause of action. If this knowledge is fraudulently concealed from him by the defendant, we should violate a sound rule of law if we permitted the defendant to avail himself of his own fraud. In chancery, where the statute of limitations is pleadable, as well as at law, it is a rule that the statute is no plea to a bill charging a fraud, if the bill be filed within six years after the discovery of the fraud: 3 P. Wms. 143. We are, therefore, satisfied that the plaintiff may reply fraud to a plea of the statute of limitations, and avoid the plea. The principle is admitted in the case of *Bree v. Holbech*.

The next question is, whether the plaintiff's replications (for they are substantially the same) disclose a fraud in the defendants, sufficient to avoid their pleas of the statute of limitations. It appears that the defendants contracted with the plaintiffs to make for them, within a limited time, a turnpike road between the termini stated in the contract; that the road was to be made on a firm foundation; that suitable materials were to be used; that the work was to be faithfully executed; that the defendants proceeded to make the road, but that they made it on a bad foundation, used unsuitable materials, and unfaithfully executed the work; and that they fraudulently and deceitfully concealed the bad foundation, the unsuitable materials, and the

work unfaithfully executed, by covering the same with earth, and smoothing the surface, so that it appeared to the plaintiffs, and to their directors, that the contract had been faithfully executed. From the view of the allegations in the replications, which, if well pleaded, the demurrers confess to be true, it is certain that the contract was of such a nature as to admit a fraudulent and deceitful execution, and that the fraud was in fact concealed from the knowledge of the plaintiffs.

I am therefore satisfied, although the plaintiffs' cause of action mentioned in the first count literally accrued at the time when the contract was to have been executed, and the one mentioned in the second count accrued from the payment of the money mentioned in their second replication, yet that these causes of action were fraudulently concealed by the defendants themselves from the knowledge of the plaintiffs until long after, and that the plaintiffs brought their action within six years after the fraud was discovered. The necessary inference is, that the fraud of the defendants, disclosed in the replications of the plaintiffs, is sufficient in law to avoid the statute of limitations pleaded in the defendants' bars, and that the plaintiffs' replications are good.

Replications adjudged good.

This case is cited and its authority recognized in *Homer v. Fish*, 1 Pick. 438, Parker, C. J., saying: "In the case of *First Mass. T. Corp. v. Field*, the replication to the statute was like the one before us, and no objection taken; and the principle is admitted, both at law and equity, that when the statute is pleaded to an action founded on fraud, a replication which avers an ignorance of the fraud until within six years is sufficient."

It is cited again in *Rice v. Burt*, 4 Cush 210; in *Nudd v. Hamblin*, 8 Allen, 131, the court saying: "Long before we had such a provision in our statute of limitations, it was held that a fraudulent concealment of the cause of action would prevent the operation of the statute until the plaintiff had obtained knowledge of its existence." The latest citation by a Massachusetts court is in *Atlantic Nat. Bank v. Harris*, 118 Mass. 153. In *Bailey v. Glover*, 21 Wall. 342, the question whether a plea of this kind as a bar to the statute can avail at law as well as in equity, is ably discussed, and the court notices the principal case among others. Mr. Justice Miller says: "On the question as it arises in actions at law, there is in this country a very decided conflict of authority. Many of the courts hold that the rule is sustained in courts of equity only on the ground that these courts are not bound by the mere force of the statute as courts of common law are, but only as they have adopted its principle as expressing their own rule of applying the doctrine of laches in analogous cases. They, therefore, make concealed fraud an exception on purely equitable principles: *Troup v. Smith*, 20 Johns. 33; *Callis v. Waddy*, 2 Munf. 511; *Miles v. Barry*, 1 Hill (S. C.) 296; *York v. Bright*, 4 Humph. 312. On the other hand, the English courts and the courts of Connecticut, Massachusetts, Pennsylvania and others of

great respectability, hold that the doctrine is equally applicable to cases at law. * * * But we are of opinion, as already stated, that the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity:" See Angell on Limitations, p. 185, citing the principal case.

RICE v. STEARNS.

[3 MASS 225.]

SPECIAL INDORSEMENT.—A payee of a note indorsed it specially thus:

"For value received, I order the contents of this note to be paid to A. B. at his own risk." Such special indorsement transfers the property in the note without impairing its negotiable quality to the indorsee.

ASSUMPT by the indorsee of a negotiable promissory note against the makers. The payee named in the note was one Symonds, by whom it had been indorsed to the plaintiff as follows: "For value received, I order the contents of this note to be paid to Merrick Rice, at his own risk."

At the trial, two of the defendants denied the signature of their names to the note; whereupon plaintiff offered Symonds to prove that he, as deputy sheriff, having arrested Stearns by virtue of an execution against him, received the note in satisfaction of the execution, as attorney for the creditor, and indorsed the same in the manner stated to the plaintiff. The judge admitted this testimony, over the objection of the defendant, and a verdict was found for the plaintiff.

Bigelow, on behalf of the defendant, moved for a new trial; and contended, in support of his motion, that Symonds was interested; that if the note was forged, he was still liable to the execution creditor for the amount of the judgment.

Dana, for the plaintiff, contended, that the witness's indorsement had released him from all interest in this action, and that his liability to answer criminally went only to his credibility, not to his competency.

By Court, PARSONS, C. J. The interest of Symonds must depend on the effect of his indorsement.

A security negotiable in its creation must, during its negotiation, preserve its negotiable quality; otherwise, when assigned, the assignee would hold a contract by the assignment different from the contract assigned. It is for this reason settled that a negotiable note indorsed in blank, or by a direc-

tion to pay the contents to A. B., omitting the words, "or his order," is further negotiable by the holder under such indorsement. It is also settled that when a negotiable security is indorsed "pay the contents to my use," or "to the use of a third person," or "carry this bill to the credit of a third person," such an indorsement is not an assignment of the security, but is only an authority to pay the money agreeably to the direction of the indorsement. There are other restricted indorsements also made; as, "pay the contents to A. B. only." Whether this indorsement is only an authority to A. B. to receive the money for the use of the indorser, or for his own use; if made for value received, or whether in this last case the restriction is not void, and A. B. may further negotiate it, seems not to be settled. If the property of the note be vested in A. B., perhaps he will not hold it with its negotiable quality, notwithstanding the restriction. But of this we give no opinion.

The case at bar is a restricted indorsement of another kind, and which in practice is very common. The promisee of a negotiable note indorses it to a third person, or his order, for value received, stipulating that the indorser is not to be responsible if the maker does not pay it. If, notwithstanding this stipulation, the indorser is answerable if the maker do not pay the note, then the witness Symonds is interested, and ought not to have been sworn.

Upon consideration, we are of opinion that the promisee, indorsing the note under this express stipulation, is not eventually holden to pay the note if the maker should not. As the promisee had the property of the note, he might dispose of it on what terms he pleased, with the assent of the purchaser, and the latter cannot complain of the necessary effect of his own agreement, and the indorser cannot be charged upon his own contract directly against the express intent of it. If this opinion is correct, Symonds, after this restricted indorsement, has no interest in the event of the suit, and was a competent witness. Another point of some importance arises, which involves the question, whether, by this restricted indorsement, the property of the note passed to the indorsee, so that he may sue upon it in his own name. If the restriction applied to the quality of the contract, so as to render a negotiable security no longer negotiable, there would be some difficulty in allowing, consistently with legal principles, an indorsement of this effect to operate as a transfer of the note. But this is not the effect of the restriction; the note remains negotiable in the hands of the

indorsee, although he has no remedy against the indorser; and in whose hands soever the note may come, the maker is still liable, according to the terms of his original contract, to pay to the promisee or his order. The note, therefore, being the absolute property of the plaintiff, and Symonds being a competent witness, the verdict must stand, and judgment be entered accordingly.

POND v. NEGUS.

[3 Mass. 230.]

TAXATION—WHEN STATUTE DIRECTORY.—A statute required that a school district tax should be assessed within thirty days after the clerk of the district should certify to the assessors the sum to be raised. This was held to be directory merely.

NEW ASSESSMENT, WHEN FIRST INVALID.—If an illegal assessment be made, the same, or succeeding assessors may make a new assessment, for which purpose the district clerk may issue a second certificate.

TRESPASS against the defendants, assessors of the town of Petersham, for illegally assessing plaintiff upon a sum voted to be raised by tax, for the building of a school house in the district of which plaintiff was an inhabitant.

It was agreed by the parties that if the court were of opinion that plaintiff could maintain this action, judgment should be taken against the defendants for the sum assessed on the plaintiff, with interest and costs; if otherwise, plaintiff should suffer a nonsuit, and costs be awarded the defendants.

The facts are reviewed in the opinion of the court.

Bigelow, for the plaintiff.

Blake, for the defendants.

By Court, PARSONS, C. J. From the facts agreed in this case, it appears that the district, on the fifth of April, 1803, passed a legal vote to raise by tax the sum of four hundred dollars, for the purpose of building a district school-house; and further, that they voted that the money should be paid by the first day of March, 1804; that on the thirty-first day of the same March the district clerk certified the said vote for the raising and paying of the said sum to the defendants, and one W. W., then the assessors of Petersham, but who were not the assessors when the vote was passed; that the same assessors, on the same day, assessed the sum voted on the polls and estates of the district, fifty-six dollars fifty cents of which was assessed upon the

plaintiff; that on the eleventh day of April, 1804, the defendants, being the major part of the assessors, delivered the same assessment to a collector of the town, with a warrant under their hands and seals, directing him to collect and pay over one-half the sum by the first of May then next, and the remainder by the first of June following.

The distraining the chattels of the plaintiff by the collector, in execution of this warrant, is the trespass complained of. And there is no objection to the legality of the assessment or warrant, if by law the assessors for the year 1804 were authorized to make the assessment and to issue the warrant.

In looking into the statute 1799, c. 66, authorizing the voting, assessing and collecting of money for the building and repairing of district school-houses, it appears that the vote to raise this money was legal, and that the clerk was directed to certify the vote to the assessors, which he has done. The statute does not direct the certificate to be made to the assessors in office when the vote passed. In some cases this might be impracticable, as when the vote shall pass just before the expiration of their office. Neither is the authority to assess the tax and issue the warrant confined to the assessors in office at the time when the vote passed, for the authority might be defeated for want of time to execute it. And although the assessors are directed to assess the tax within thirty days after the certificate, yet there are no negative words restraining them from making the assessment afterwards; and accidents might happen which would defeat the authority, if it could not be exercised after the expiration of thirty days. The naming the time for the assessment must, therefore, be considered as directory to the assessors, and not as a limitation of their authority. And the time of payment expressed in the vote cannot be conclusive against the exercise of this authority in the present case; for the power of fixing the time of payment is not given to the district, but to the assessors, who are to limit it in the warrant.

From the consideration of these facts only, the conclusion would be against the plaintiff. He relies on other facts in the case. It is also agreed that the district clerk, on the seventeenth day of February, 1804, made a certificate of the vote to the assessors then in office, who on the same day, undertook to make the assessment, and to deliver it to the plaintiff, then a collector for the town, with a warrant to collect the money and pay it over by the first day of March, then next, agreeably to the vote of the district. If these proceedings had been legal,

unquestionably the subsequent certificate of the assessment and warrant would have been a nullity, as the vote of the district to raise the money would have been carried into effect by the clerk and assessors. But it is agreed that the assessment and warrant were illegal, and were revoked. That being the fact, might not the same assessors have issued a new warrant, without a second certificate from the clerk? Certainly they might, unless by the statute they were restricted to make the assessment within thirty days after the certificate, which it is our opinion they were not. If those assessors might make a new assessment, no good reason can be assigned why their successors should not, as the statute does not require the assessment to be made by the assessors in office when the vote was passed; unless it is an objection that the assessors could make no assessment until they received a legal certificate from the clerk, and that he having made a certificate to their predecessors, his second certificate was a nullity. It must be admitted that the clerk's certificate is necessary to authorize the assessors to proceed; but the objection that the second certificate is a nullity does not seem to be well founded. It is not contended that for no cause whatever can the clerk make a second legal certificate. The first may be lost, mislaid, or destroyed by accident, before the assessment is made; and it would be unreasonable to decide that he could not make a second certificate in that case, that the assessors may have in their possession a document necessary to justify them in proceeding.

The question then is whether, in the present case, there was not a reasonable cause to make a second certificate. And we think that there was a reasonable cause. The first assessors had, through mistake, done nothing towards carrying into effect the vote of the district. They were now out of office, and their successors could not proceed until they had a certificate. Certainly it was the duty of the clerk to make it.

But it is said that inconveniences may result to the district from this construction, as in the meantime they may alter their resolution, and may not wish to have the money assessed. If any inconvenience should arise to the district, it must result from their own negligence. For if, in fact, they do not choose to have the money raised, they may, at a legal meeting at any time before the assessment, rescind their vote; and then the assessors, after regular notice, will have no authority to make the assessment. The vote is not a grant of money; it is only a resolution to provide themselves with money, and if, upon con-

sideration, they find they can do without it, it would be very unreasonable if they could not annul their resolution, when no person can be injured by it. On the other hand, if the district still want the money, they are deprived of the effect of the vote by accident or error, if in this case a new certificate cannot be made, and an assessment and warrant to collect the money pursuant to it. And a new meeting must be called, and a new vote passed for the same purpose; but on what ground of legal necessity it is not easy to conceive.

Upon a consideration of the whole case, it is our opinion that the second certificate, and the assessment and warrant made pursuant to, are regular, and a sufficient defense of the assessors in this action.

Plaintiff nonsuited.

Cooley, on Taxation, p. 220, notices this case as showing where statutory provisions have been decided to be merely directory. Again, p. 256, he notices it saying: "An abortive attempt to make an assessment does not exhaust the power, and if no other obstacle exists, the officers may disregard the futile action and proceed anew;" and to this he cites *Himmelman v. Cofran*, 36 Cal. 411, where the principal case is cited and its doctrine recognized.

The authority of the case is well recognized in Massachusetts. It is cited in *Inglee v. Bosworth*, 5 Pick. 552; *Joyner v. Third District*, 3 Cush. 570; *Eames v. Johnson*, 4 Allen, 384, the court saying: "It was urged that the case of *Pond v. Negus* would authorize holding this provision, requiring the unpaid highway tax to be added to the next assessment to be construed as merely directory. It was so held in that case in reference to the provision requiring a school district tax to be assessed in thirty days after the clerk of the district should certify to the assessors the sum voted to be raised. That case arose under other provisions of the law, and is certainly obnoxious to the objection of allowing a tax to be assessed after the term in which it was made the duty of the assessors to assess the same, and we are not disposed to extend it." The case is again cited as showing when the provisions of a statute are directory, in *Whittier v. Way*, 6 Allen, 292. The recent citations of the case are in *Oakham v. Hall*, 112 Mass. 539; *Woodbridge v. Mayor*, 114 Id. 486; *Fanning v. Commonwealth*, 120 Id. 390. In New York, it is cited on the point showing when a statute is merely directory, in *Dawson v. People*, 25 N. Y. 406.

LEE v. BOARDMAN.

[3 Mass. 233.]

TOTAL LOSS, WHEN DETERMINED.—An insurance was effected upon a ship and freight, from Boston to one or more ports beyond the Cape of Good Hope, and at and from thence to a port of discharge in Europe or in the United States. On her return, within three days' sail of Lisbon the vessel was captured by a British frigate, carried to Bermudas,

and libelled in the admiralty court as prize. When the insured had notice of the capture, and while the vessel was detained, he made an abandonment to the insurers, who refused to accept. The ship and cargo were afterwards restored and arrived safely in New York, where the cargo was landed in good order. The insured was held entitled to recover for a total loss of the ship and freight; the fact of the total loss to be determined at the time of the abandonment, and not by subsequent events.

ACTION on a policy of insurance on the ship *Elizabeth* and freight, from Boston to one or more ports beyond the Cape of Good Hope, at and from thence to her port of discharge in Europe or the United States, with leave to touch at the usual places for supplies. It was agreed that the loss should be paid in sixty days after proof, and that the freight should not be liable for wages, provisions or detentions.

The following facts were submitted for the opinion of the court: The defendant subscribed the policy declared on, and the plaintiff was interested in the ship and freight to a greater amount than the sum insured. The ship sailed from Boston on her voyage, and arrived at Sumatra, from whence she sailed July 22, 1805, with a cargo of pepper, bound to Lisbon. On the tenth January, 1806, when within three days' sail of Lisbon, she was captured by a British frigate, carried to Bermudas, and libelled in the admiralty court as prize; but in August following, the ship and cargo were ordered to be restored to the master, who proceeded to New York, where, after landing the cargo in good condition and receipt of full freight by the supercargo, the vessel was sold for the payment of the wages due the seamen. The plaintiff first learned of the capture on the twenty-first of March, 1806, and on the twenty-fifth of the same month offered to abandon the ship and freight to the underwriters, who refused to accept. The plaintiff gave no directions to the supercargo respecting the property thereafter, and the underwriters also declined to interfere.

Amory and Dexter, for the defendant, contended that the only loss in this case could arise from the detention, which had been excepted by the terms of the policy; that, in fact, the full freight had been received; that the abandonment did not entitle the insured to recover for a total loss, as the property had been restored in good condition; that permitting the vessel to be sold for wages due from the insured, was a waiver of abandonment.

Jackson, for the plaintiff, insisted at the time of the abandonment the vessel was in the hands of the captors; that she had

never been restored to plaintiff, but had ever since been under the control of the underwriters' agents, the master and supercargo; that the voyage was lost, the destination being Lisbon, and at the time of the abandonment, it being reasonable to suppose that the voyage was defeated; and that the insured was entitled to recover according to the state of the case at the time he made his claim: *Marshall*, 485.

By Court, PARKER, J. [after reciting the facts.] Upon this state of facts, the plaintiff claims to recover, as for a total loss of ship and freight, upon the ground that his offer to abandon on the twenty-fifth of March, while the ship was actually in possession of the captors, and under legal process in the admiralty court, vested in him a perfect right to recover, which could not be impaired by any subsequent event not within his agency and control, and not produced by his consent.

The defendant denies that there ever was a total loss; but if there was, contends that the acquittal and restoration of the ship, her safe arrival at New York, delivery of her cargo and earning freight, are facts which change the total into a partial loss, for which only, he says, the plaintiff can recover in this action. And he contends this with more confidence, because, he says, that all these facts happened before the commencement of the plaintiff's action, the writ not having been served until the fifteenth of September, although it appears to have issued some time before.

On the question made by the counsel, whether the actual suing out of the writ, or the service of it, was the commencement of the action, no opinion need be given, as the decision of this cause rests upon a principle which renders a settlement of that question unnecessary.

That the capture of this vessel as prize, conveying her out of the course of her voyage, and libelling her as prize, gave the insured a right to abandon during the existence of those facts, and to claim for a total loss of ship and freight can admit of no doubt. The only argument assumed by the defendant's counsel upon this point is, that these facts, having happened through the intervention of a power in amity with the United States, they do not constitute a capture in its technical sense, and that the ordinary consequence of a capture cannot flow from them.

But whether there was a technical capture or not, is immaterial in the present question, it being well settled that any detention by princes, by embargo, or otherwise, gives the insured

a right to abandon and claim as for a total loss, as well as a capture by enemies: Marshal, 483. But it seems also well settled, that facts like those agreed in the present case do, between insurer and insured, constitute a capture, and draw after them all the consequences of a capture. English and other foreign writers place the taking of a neutral ship upon the same footing as it respects a contract of insurance, with the capture by an enemy, in open war. For any loss occasioned by capture, whether lawful or unlawful, and whether by friends or enemies, the insurer is liable. He is also liable, whether the property in the thing insured be changed by the capture or not: Marshall, 423, 432. If a neutral ship be taken, and carried into the port of a belligerent, under pretense that she belongs to the enemy, or is laden with enemy's goods, this is a capture, because it is done as an act of hostility; and if she be afterwards restored, still it must be considered a capture: Emerigon, Tom. 1, 537. The assurer is held, whether the capture be just, or unjust, whether it is caused by hostility, or be for plunder; for in whatever manner it is done, it is a marine accident; or peril of the sea; and the insurer is held for all perils of the sea: Pothier. Valin, also, in his commentary on the 26th article of the ordinance of Louis XIV, says, the assurers are answerable, not only for captures made by enemies, but even for those which are unjustly made by friends, whether allies or neutrals; in one word, for all captures made by reason of hostility, robbery, or otherwise. The taking of this ship being with intention to make prize of her, as is proved by her being libelled as prize, and as is agreed in the case, there can be no pretense, but it was a capture within the principles laid down by the eminent writers before cited. This capture constituted total loss of vessel and freight, if the insured chose to consider it during its continuance, by abandoning his interest therein to the underwriters. Had he neglected to abandon, until after the restoration of the ship to the master or supercargo, he would have waived his right to consider the capture a total loss. But it appears here, that the offer to abandon was during the detention of the ship by the captors, and while she was under admiralty process. His right, therefore, became vested, and was perfect; and the only question which can admit of an argument is, whether the subsequent restoration, without any act on his part showing an intention to waive the right acquired by the abandonment, shall change this total into a partial loss.

And here the defendant contends that, as the ship was re-

stored to the master, who, under direction of supercargo, navigated her to New York, where she safely delivered her cargo, and earned her freight, before the commencement of this action, the loss, if ever total, had become partial; and that, according to Lord Mansfield's doctrine in the case of *Hamilton v. Mendes*, the plaintiff ought to recover only for the damage actually sustained.

The doctrine thus advanced by Lord Mansfield is less accurately stated than was usual for that great man upon subjects of this nature; and, indeed, if true, in the sense assumed by the defendants, militates with principles which he has established with much more precision and greater strength of reason. It should be remembered, too, that in the case he was then considering, there was no abandonment until the temporary restraint upon the ship had ceased, and she had resumed the course of her voyage, and indeed nearly terminated it. The doctrine contended for by the assured in that case was, that the capture alone, without condemnation, and without abandonment, during its continuance, was a total loss. This doctrine he entirely and justly discountenanced, and then expressed his doubts whether to entitle the plaintiff to recover, the loss should not continue total up to the time of the commencement of the action. It does not appear that, had there been an abandonment while the capture continued, he would not have considered the total loss as continuing. Indeed, I see nothing in that case from which it is to be inferred that a vested right does not accrue to the insured after abandonment in case of capture, although the vessel be afterwards restored.

It appears to be perfectly well settled, taking the whole course of English authorities upon the subject of insurance into view, that whenever a total loss, in the legal contemplation of the phrase, has accrued, an abandonment or offer to abandon by the insured, gives a vested right to claim for such total loss, and throws the property upon the assurer.

It appears also that in such case the master, or whoever has charge of the property, becomes instantly, upon abandonment, the agent of the assurer; that the earnings of the ship belong to him, and that where the cargo is insured, the rise and fall of the market is at his hazard, and to his benefit, so that upon abandonment seasonably made or offered, the only question would seem to be whether a right to abandon existed at the time; and if it did, the relation of the parties to the property is fixed by that act, unless where the assurer does not accept, and

the assured waives his right, which has been done in this case. If this doctrine be not true, but the rights of the parties are held to be uncertain and fluctuating, after a regular abandonment under circumstances which, by the laws of insurance, constitute a total loss, there seems to be no reason why the commencement of the action should be fixed upon as the period when this uncertainty is to cease, rather than the time of rendering the verdict; for until then, if it is upon principles of equity, the door is kept open, and there is opportunity for an equitable adjustment. But how great the inconvenience would be to the public, and to the parties to the contract, that the degree of responsibility of the insurer should not be known until the end of a law suit is attained, must be obvious to every one who considers the importance of having some legal owner of the property abandoned, to prevent its waste and destruction. In the mean time, it is out of the power of the assured to calculate with any certainty upon the extent of his funds, his commercial enterprise will be checked, and his plans embarrassed and defeated.

For these reasons we are all of opinion that the interests of commerce, as well as that of the contracting parties in a policy, require that some period should be established, at which the right of the insured to his indemnity, and of the assurer to the property, should be fixed; and we think we are clearly warranted by sound principles to fix the time of abandonment as that period. No case, to our knowledge, has occurred in England precisely establishing this point, though the principles adopted there must lead to this conclusion, whenever a case happens which will require a specific adjudication upon this subject. Indeed, the principle seems to be fully admitted in the case of *Kemp v. Vigne*, 1 T. R. 804, where Lord Mansfield himself says that a temporary capture is such a total loss as that an insured upon interest is warranted in abandoning at the time if he please. Now, no case has been cited which shows that after an abandonment rightfully made, the assurer can resist the payment of a total loss.

Emerigon, before cited, shows that the abandonment under such circumstances is the proper test of the assured's claim. His words are: "If, upon a total loss happening, the ship be abandoned, but afterwards arrive safe, or otherwise recover her liberty, the insurer shall, nevertheless, satisfy the insured as for a total loss; but then they, that is, the insurers, are entitled to all benefits of the voyage." This is all which is contended for

by the plaintiff in the present action; and he seems to have made good his claim.

A case was lately decided in the supreme court in the state of Pennsylvania, which presented the same objections, besides others more forcible, against a recovery for a total loss, as we find in the case before us, but they did not prevail; and the principle we have now decided was unanimously assented to by the judges of that court.

We see no difficulty in the application of this principle in relation to the ship, or to the freight; the abandonment applied to both, and the case does not show any act of the assured, amounting to a waiver of his rights, as to either of the subjects of the policy. Judgment must, therefore, be for a total loss both of vessel and freight.

See *De Peau v. Russell*, 2 Am. Dec. 676. It was held in *Munson v. New England Insurance Company*, 4 Mass. 88, that where by the terms of a policy of insurance, a loss is payable at a given time after notice of the loss, and if at the time of abandonment the insured had a right to recover for a total loss, this right will not be effected by the credit given to the insurers in the payment of the loss, although in the meantime the loss has ceased to be total.

Parsons, C. J., gave a statement of the facts in the opinion thus: The jury having found a verdict for a total loss, the counsel for the defendant make two objections to it. The first is that at the time of the abandonment no evidence of the loss was exhibited. The capture took place on the twenty-fifth of April, 1806, and on the first of May following, one of the owners wrote the plaintiff an account of it, and stated that the intelligence was received by one of the pilots, who was on board the ship and had been turned out by the captor. On the fifth of May he again writes, directing the plaintiff, in consequence of the capture he had mentioned in his last, to abandon the ship and cargo for him and his partner. On the eighth of May, Munson communicates these letters to the office, and makes the abandonment, according to the directions; and it appears from the report that the intelligence of the pilot was true, and that the ship and cargo arrived at Halifax, and were there libelled as prize, and were in custody of the admiralty when the abandonment was made. * * * The second objection is, that the loss was not payable, by the terms of the policy, until sixty days after notice of the loss, and that before that time the property was restored. We do not think there was any weight in this objection. The abandonment was made on the eighth of May, at which time the loss was total, and a right to recover for a total loss was vested in the assured; and this right cannot be affected by the credit given to the assurers in the payment of the loss, whether that credit was long or short.

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TAYLOR v. LOWELL.

[3 MASS. 331.]

WHEN POLICY ATTACHES.—A policy was effected on a ship, cargo and freight, each being distinctly valued, at and from Calcutta to a port of discharge in the United States. At the time the policy was taken, the insured represented that the ship was at Calcutta in July, and would probably sail in August. She sailed in August; but proving leaky as soon as she went to sea, and the leaks continuing, she returned to Calcutta, and relanded her cargo; and upon a survey it was found that the leak arose from causes existing at the time the cargo was put on board, and that she was not seaworthy at the time of her sailing. She was then thoroughly repaired, the cargo reladen, and sailed again the following February, arriving home in safety. In an action for the premium it was held that the policy attached on the vessel, cargo and freight, while in port, and before the sailing in August; and that the insurers continued liable after her return to port, and during the subsequent homeward voyage, and therefore they had a right to the premium.

ASSUMPSIT for the premium on a policy of insurance. The question was, at what time a policy on a ship, cargo, and freight, distinctly valued, at and from Calcutta to a port of discharge in the United States, attached so as to render the insured liable for the payment of the premium.

The facts of the case, and the points raised by counsel, appear from the opinion of the court.

Amory and Hall, for the plaintiff.

Dexter and W. Sullivan, for the defendant.

By Court, SEWALL, J. The plaintiff demands the amount of certain premiums due on a policy of insurance of the ship *Three Sisters*, her cargo and freight, with the charges of the policy; for which he alleges the promise of the defendant's intestate in his lifetime. The state of facts, referred to the consideration of the court, admits that the plaintiff, as an insurance broker, being employed by the intestate, effected at his request, and for his account and use, the policy mentioned; which was proposed for the sum of forty-three thousand dollars, and subscribed for the sum of thirty thousand one hundred and fifty dollars, in January, 1798, to insure the ship, her cargo and freight, distinctly valued by the policy, at and from Calcutta, to a port or ports of discharge in the "United States," for a premium of twelve per cent. It is also admitted that the defendant's intestate had the insurable interest specified in the policy; and that, in applying for his insurance, the defendant communicated a letter from the master of the ship, informing

that the ship was at Calcutta, in July, 1797, had commenced the lading of her homeward cargo, and would probably sail in the course of the next month.

It also appears that the ship mentioned was at Calcutta, and there commenced her lading in July, and sailed therewith in August, preceding the date of the insurance; but proving leaky as soon as she was at sea, and her leaks continuing to increase for some days, she was thought to be incapable of the voyage; and the master thought it necessary to put back, and accordingly returned to Calcutta, where he arrived in October. There the cargo was relanded, and the ship surveyed and examined; when it was discovered that her bottom and keel were defective, and had been eaten by worms; and that this latent defect had occasioned the leaks. And the parties agree that the defect existed at the time the lading commenced, and when the ship sailed from the port of Calcutta, and that the ship was not then seaworthy. It further appears that after this survey the ship underwent a complete repair, and in February, 1798, sailed again from Calcutta for the United States, and, before this action was commenced, arrived at the port of Boston in good safety.

This demand is resisted, upon the ground that the policy effected never attached upon the property proposed to be insured, and that the insurance intended was rendered wholly void by the want of seaworthiness and insufficiency of the ship *Three Sisters*, when she sailed from Calcutta in August, 1797; and that the voyage afterwards commenced was not within the terms of the policy, or was excluded by the representation of the insured, when the policy was effected.

The defense suggests this principal question, whether the policy for which the agreed premium is demanded in this action, though *prima facie* a sufficient contract on the part of the underwriters, was, under the circumstances which have been stated, so far ineffectual and void as to entitle the assured, or his representative, to a return of the premium, or as this action is, to defeat the plaintiff's demand, either in the whole, or for any part of the premium demanded. The general rules of law applicable to this question are expressed by Lord Mansfield in the case of *Tyrie v. Fletcher*, Cowp. 668; Park, 377: "Where the risk has not been run, whether that circumstance was owing to the fault, the pleasure, or the will of the insured, or to any other cause, the premium shall be returned." And "where the risk is entire, if it has once commenced, there shall be no

return of premium afterwards." These rules of the law merchant, adopted by the common law: 4 Bl. Com. 67, are entirely conformable to the principles stated and explained by foreign jurists. Thus Roccus, in his treatise of insurances, after citing several cases of return premium, maintains this fundamental maxim by a variety of authorities: "*Si non adest risicum, assecuratio non valet, nam non adest materia, in quâ formâ possit fundare.*" Roccus *de assecural*, 56, 57, 82, 88. And according to Emerigon: "Insurance is a conditional contract, and conditional in two respects: 1. The contract fails, if before the commencement of the risk the voyage is interrupted, even by the act of the insured himself—the contract is revoked by a failure of the risk. And secondly, insurers are liable only in the event of a loss, total or partial, occasioned by a peril of the sea" (*par fortune de mer*). "But insurers are not liable for a return of premium after the risk has commenced, even if it should have but a momentary continuance: 1 Emer. ch. 1, sec. 8; 2 Emer. ch. 16, sec. 1, 2; Poth. n. 5.

In the present case, the risk intended to have been insured is supposed to have failed, not by its being actually interrupted or withdrawn before the insurance upon it commenced, but because it existed under circumstances which discharged the insurers, and in which no responsibility attached to them.

Foreign jurists consider insurers as not liable for losses or damages occasioned by the fault of the insured, his agents or servants, or by an original defect of the thing insured, *ex vitio rei et intrinsecâ ejus naturâ*. It is upon this principle that, in cases of innavigability, importing, according to their jurisprudence, an entire failure or irremediable defect of the vessel, rendering her incapable of existing as a ship, or of fulfilling the purpose of her destination, the insurers are discharged, and are not liable either for the loss of the vessel or the voyage insured, when they can prove her to have been in an innavigable state at sailing: 1 Emer. ch. 12, sec. 2, 9, 38; 2 Val. 80, 81; 1 Val. 659.

The same general principle was enforced or relied on for the discharge of the insurers in the cases of *Lee v. Beach*; *Oliver v. Cowley*, and *Mills v. Roebuck*, Marshal, 368, 369, 370, the most noted cases which have been decided in England upon the doctrine of seaworthiness. By these decisions it is very clearly established that insurers are not liable, when the vessel insured perishes or is condemned as incapable of proceeding, if the loss was occasioned by her own weakness or natural decay, without

any extraordinary violence of the sea or winds, or other external misfortune; or where goods insured, having been laden on a vessel in a defective state, suffer damage, or are lost, in consequence of the total innavigability of the vessel, if occasioned by a defect existing at the commencement of the risk. In each of these cases, the loss demanded by the insured proceeded immediately from the defective state of the vessel upon which the insurance had been made; and the decisions are entirely consonant to the general principles of the marine law. But in these and other cases, where the same subject has been incidentally mentioned, the doctrine of the common law is stated to be: "That in every insurance, whether on ships or goods, there is an implied warranty that the ship shall be seaworthy when the risk commences; that is, that she shall be tight, staunch and strong, properly manned, provided with all necessary stores, and in all respects fit for the intended voyage:" Marshall, 363, 364.

It is upon this more enlarged doctrine or remedy of the common law, that questions of return-premium have been made in cases where a contract of insurance has been construed to have been dissolved by the innavigability or defective state of the vessel insured, existing at the commencement of the risk. Accordingly, Marshall states a want of seaworthiness as presenting a case of return-premium: "If the contract be void, on account of the non-compliance with any warranty, express or implied, as if the ship do not sail on the day prescribed, or do not depart with convoy, or be not seaworthy, and there be no fraud imputable to the insured, he shall be entitled to a return of premium, because the contract never attached, and the risk, therefore, never commenced: Marshall, 557, 564.

In cases where the insurance has been defeated by the non-performance of express warranties, limiting the time of sailing or engaging to sail with convoy, the underwriter has been holden entitled to his premium, and permitted to retain it, or a proportion of it when the contract has been found divisible, if the insurance had commenced previous to the breach of warranty, as when made upon the vessel or goods at the port, as well as for the voyage from it: *Meyer v. Gregson*, Marshall, 568; *Rothwell v. Cook*, 1 Bos. & Pol. 172.

In the case of *Penson v. Lee*, 2 Bos. & Pol. 330, upon a policy of insurance, the defense was a want of seaworthiness, and the underwriters succeeded in it. The insured, after some deliberation upon a point of practice which alone gave occasion

to the report of the case, obtained a verdict for a return of premium; but the facts upon which the principal question was decided are not reported; and it does not appear when the insurance was understood to have commenced, whether at the port, or upon the departure of the vessel.

In the case of *Forbes v. Wilson*, Park, 229, cited in the argument for the plaintiff, the insurance was at, as well as from the port of lading, upon a ship then (and therefore at the intended commencement of the voyage) undergoing very material repairs, and not seaworthy. The vessel sailed in a navigable state; and to a demand for a subsequent loss, the underwriter objected the defective state of the vessel before sailing, and at the intended commencement of the risk. Lord Kenyon was of opinion that, under the words at and from the port of lading, it is sufficient if the ship be seaworthy at the time of sailing; for, from the nature of the thing, the ship, while in port, must be undergoing some repairs; and he decided for the insured; and this decision appears to have been acquiesced in. It may not be understood, from this case, to have been directly decided that an insurance commences upon a ship while not seaworthy, although in port. But in another case, that of *Motteux v. London Insurance Company*, the law was taken to be so, unless the point was entirely overlooked. There the insurance commenced upon a ship from her arrival at Fort St. George, which came thither from Bengal in a decayed condition, and, after unlading her cargo, went back to Bengal for necessary repairs. Being put into a state of repair, the ship sailed again upon her homeward voyage, and was lost in the river of Bengal, upon the Engilee sands. In the final decision of this cause for the plaintiff, upon the ground that the loss had happened in the course of the voyage insured, it must have been understood that the insurance commenced at Fort. St. George, notwithstanding the state of decay in which the vessel arrived there, and continued, when she sailed from Bengal, repaired and fitted for the homeward voyage.

The resemblance of that case to the present, in all the facts material in determining the validity of the insurance, is sufficient to make the decision an authority in point. But the law of that case, applicable to the present inquiry, was rather adopted without question than expressly decided. On this account it is not, perhaps, to be relied on as a complete authority. That decision, however, as well as the decision by Lord Kenyon, in the case of *Forbes v. Wilson*, Park, 229, are

wholly irreconcilable with the supposition, which has been urged in the argument for the defendant, that the implied warranty of seaworthiness is in the nature of a condition precedent. This opinion has not been supported by any decision which has been cited, and is in some degree opposed by the construction given to express warranties in the cases referred to on that subject. This implied warranty is not governed by the rules applicable to the question of property in the assured. An interest in the risk is a prerequisite to the substantial existence and validity of a contract of insurance: 1 Emer. ch. 11; and this, by the general policy of the law; for it is never treated of as an implied warranty or engagement of the insured. In practice, therefore, when a loss is demanded upon a policy of insurance, the insured is held to prove his interest. In the other case, the insurer must prove a want of seaworthiness in the vessel insured, if he would thereby avoid the contract.

If we have recourse to general reasoning, in this inquiry, for the want of any direct and complete authority from decided cases, it may be observed that stipulations on the part of the insured, which, not being expressed, are enforced as the implied intentions of the parties; for example, that there shall be no unnecessary deviation from the voyage described; that the vessel shall be suitably manned, shall be conducted with the advantage of customary pilotage, and shall be seaworthy, are reciprocal engagements inferred from the nature of the contract and arising with it. And although the remedy adopted or provided by the common law, against a failure in either of these stipulations, is a forfeiture of the entire contract incurred on the part of the insured, yet this respects losses or damages subsequent, and not previous to the failure of the assured in his implied reciprocal engagement. Thus, in the case of deviation, even when it has been designed at the commencement of the voyage, the forfeiture of the insurance is not incurred until the departure actually takes place, and until that time the insurer is liable. A forfeiture by a want of seaworthiness may coincide with the commencement of the risk insured, as when the insurance commences from the sailing of the vessel, and she sails and pursues her voyage in an innavigable state; there the contract may be construed to be avoided *ab initio*, the underwriter incurs no risk, and is therefore not entitled to retain his premium.

The seaworthiness of the vessel, her complete capacity to perform the voyage insured from the port of sailing, is not material to the portion of the risk incurred at the port before sailing. A

loss or damage occasioned by the defect of the vessel, whether occurring in port or at sea, is not chargeable to the insurer. A possible deficiency of the vessel while in port, a necessity of repairs, some delay for the purpose, are events unavoidably contemplated by the parties in every contract of insurance. Lord Kenyon says, from the nature of the thing, every ship is, while in port, unavoidably undergoing repairs. The case of latent defects is not essentially different; for these may or may not be discovered before sailing. If any case may be supposed of a vessel insurable while in port, although in a defective state, it becomes necessary to ascertain the circumstance or event, which shall be construed a breach of the implied warranty of seaworthiness. From the authorities cited, from the nature of the warranty itself, this can be no other than the sailing of the vessel in an innavigable state. Then the state of the vessel becomes material to the risk insured; and then the extraordinary exposure, contrary to the intention of the parties, is a forfeiture of the insurance; and until this event, even in the case of a latent defect, the sailing in a defective state, and, therefore, the forfeiture is future and contingent, and could not be objected to a loss previously occurring.

Respecting the insurance upon the ship *Three Sisters*, the conclusion is, that, notwithstanding her latent defects, the insurers, though not liable for any loss occasioned by those defects, were answerable for any other loss within the terms of the policy, which might have occurred to the vessel while in port and before sailing.

Respecting the goods and freight, there is a circumstance which deserves some further consideration. Was the lading of the goods upon a vessel in a defective state, which occasioned a relanding of them, a sufficient lading to commence this part of the risk insured? And if so, as was suggested in the course of the argument, at whose risk were the goods, when relanded and while on shore? For injuries to a cargo taken on freight, not occasioned by the perils of the sea, but by the defective state of the vessel, or the neglect or misconduct of the owners or mariners, the master and ship-owners are responsible to the freighters; and against these injuries they cannot insure, unless in some instances, by a special clause in the contract. The responsibility of the master or ship-owner commences at the receipt of the goods; and at the same time the right to freight commences, which becomes then an insurable interest. Where the ship-owner is also owner of the goods, and the freight is

the expected increase of price to arise by the carriage of them to a foreign market, the rules respecting the insurance of the cargo and freight are the same. They are not insurable against perils occasioned by the innavigability of the vessel, or the neglect or misconduct of the owner or his agents; but the goods become cargo as soon as they are received for the vessel, and with their freight, or the benefit of their carriage, become an interest insurable under those names, against the perils of the sea, or those external misfortunes which are not to be prevented by human foresight. While in port, the cargo and freight, as well as the vessel, are exposed to perils of this kind; for instance, to capture, detention or fire, which are not aggravated by a latent defect of the vessel, and respecting which the ship-owner is entirely innocent. In the case of a freighter sustaining a loss of this kind, and a subsequent discovery of a latent defect in the vessel, it would hardly be pretended, even if the insurer were discharged, that the ship-owner could be made responsible; the loss not being occasioned by the defect for which he is chargeable, and the sailing in an innavigable state, being at the time of the supposed loss, altogether future and contingent. Abbot on Shipping, 146, 148; 1 Emer. 373, 374, 375; Molloy, lib. 2, ch. 2, sec. 10.

Upon this reasoning, I infer that the construction of the implied warranty is the same on the question respecting the goods and freight, as it is respecting the vessel; that the circumstance by which the breach is ascertained, to the effect of avoiding the policy, is the sailing of the vessel in an innavigable state. Until then, there is an opportunity for the cure of latent defects, if they should be discovered, and their mere existence, while not prejudicial or material to the risk insured, is not a forfeiture of the contract.

Whether in this case there was a division of the risk insured, is a question which will require very little discussion. In the case of *Stevenson v. Snow*, and several subsequent cases, in which that decision has been adhered to with some hesitation, the division of the risk has been placed altogether upon the ground that the two voyages, or distinct risks, appeared satisfactorily in the contract of the parties, or constructively from a usage connected with it. In this case, there is nothing in the words of the contract to suggest a division of the risk, nor has any usage been stated to aid the construction; and, indeed, both intention and usage are excluded by the circumstances of this case.

It may be of some utility to notice the other view of the case suggested by the state of facts; although the opinions and reasons already offered may be satisfactory in deciding the question upon which the defense in this action depends. The period and event subsequent to the return of the ship *Three Sisters* to the port of Calcutta, are within the descriptive terms of this policy, either as a revival or continuance of the risk previously commenced, or, if in construction of law, there had been no previous commencement of the risk insured, then as constituting a risk to which the policy in question was completely applicable. The last would have been precisely the state of the case if the insurance had been from the port of Calcutta, and for a risk commencing with the voyage. Against a construction to this effect, it has been contended for the defendant that the insured, by his own representations of the state of the risk, was prevented from any application of the policy to the period of events subsequent to the return of the vessel to the port of Calcutta. Considering the assured to be concluded by the assertions of his captain, the only facts positively represented by his letter are the continuance of the ship at Calcutta in July, 1797, and that she had then commenced her lading. The time of her sailing is stated conjecturally, and there was no undertaking by the assured that the event should be as the captain had conjectured it might be. And it deserves consideration that an objection of this kind, if made by the insurers, would have been liable to this reply: that the risk in fact had been more favorable to them than it had appeared in the representation, which, by its tendency to enhance the premium, had been injurious only to the insured. And upon the whole, there seems to have been nothing in the representation which varied the condition of the contract, or which would have operated to prevent the legal effect of it, according to the obvious construction of the policy.

A necessity of repairs must be within the contemplation of the parties, and every unavoidable delay and deviation occasioned thereby is, therefore, constructively permitted in a contract of marine insurance. This was the point decided in the case of *Motteux v. The London Assurance Co.*, which was a case of a known defect, existing at the commencement of the risk insured, and where a resort to another port for necessary repairs was found to have been unavoidable. The case is cited by Mr. Park, 300, in proof of this general position that if a ship is decayed, and goes to the nearest place to refit, it is no devia-

tion. He cites also the case of *Guibert v. Readshaw*, Park, 301, where a want of sufficient ballast, in the opinion of the captain, induced him to depart from the course of the voyage insured, upon the solicitation of the crew. This was decided to be no deviation; and yet a want of sufficient ballast is a want of seaworthiness. In the case of *Scott et al. v. Thompson*, 1 B. & P. 181, the plaintiff claimed under a limited policy a loss occurring out of the course of the voyage insured, where the deviation had been caused by a force and accident not insured against, and the insurer was determined to be liable. In the present case, the delay, or as it may be called the departure, in the voyage and risk insured, supposing it to have commenced in July, 1797, was occasioned by an accident not insured against, and the defective state of the vessel at the commencement of the risk, but being unavoidable, and for the necessity of repairs, to enable the vessel to perform the voyage insured, it was not a deviation prejudicial to the insurance.

Upon the whole, it may be understood to be the opinion of the court, in considering the validity of the insurance for which the premium is demanded in this action, that the policy in question attached upon the vessel, cargo and freight, while in port, and before the sailing of the ship *Three Sisters*, in August, 1797; and that the insurers continued liable after her return to port, and for the subsequent homeward voyage, and of course that the defense, upon the merits of it, is not in any part supported.

It is necessary to notice one other objection made, though not much insisted on, for the defendant, to the form of this action; that the party plaintiff, claiming as broker only, is not entitled. And to this it may be sufficient to observe that the direction by the assured, the defendant's intestate, to the plaintiff to charge the premiums in his account, was in itself a contract and promise on the part of the assured, and established a right of action in the plaintiff. Marshall observes that, according to the usage of trade in London, it is generally understood that the insurance broker alone, and not the underwriters, can recover the premiums from the insured; though the point had not been settled by a judicial determination. But there can be no reason against the action in the name of the broker, where a note has been given to him, or he has become the creditor of the insured at his request.

In *Merchants' Ins. Co. v. Clapp*, 11 Pick. 63, the authority of this case came under the consideration of the court, which say: "The defendant's

counsel, however, by a very able argument has attempted to impugn the authority of that case, and to show that it cannot be maintained upon the well established principles of commercial law. But it must be remembered that the circumstances under which that case was decided were such as to give to the judgment of the court the greatest weight of judicial authority. It was a case of great importance. It was carefully and fully investigated. The defendant himself, against whom judgment was rendered, and his counsel, were lawyers of the highest eminence. The case was twice argued; and it was decided by judges pre-eminent for their wisdom and learning, and distinguished by their familiar knowledge of commercial law. Mr. Justice Sewall, who delivered the opinion of the court, carefully examines the authorities, and fully considers the principles of the law of insurance as applicable to the point in question. And the unanimous decision of the court, after such an investigation, must be admitted to be of the highest authority." The authority of the case is not shaken in Massachusetts. See *Paddock v. Franklin Ins. Co.*, 11 Pick. 232; *Commonwealth Ins. Co. v. Whitney*, 1 Met. 23; *Worthington v. Bearse*, 12 Allen, 386; *Leonard v. Washburne*, 100 Mass. 254.

ADAMS v. FROTHINGHAM.

[8 Mass. 352.]

RIPARIAN GRANT, EXTENT OF.—A proprietary grant, in 1680, of "a piece of land below high-water mark, to set a shop upon, not exceeding forty feet in width," was construed to include the land as far as low-water mark.

ESTATE IN COMMON.—A conveyance of a moiety of a piece of land in "quantity and quality," creates an estate in common between the grantor and grantee.

OWNERSHIP OF ALLUVIAL LAND.—Whatever addition is made to the shores of rivers or streams by alluvion, from natural causes, or from a union of natural and artificial causes, belongs to the riparian owners of the shores.

ACTION to recover an undivided moiety of a certain tract of land. Upon a writ of review tried before PARKER, J., a verdict was a second time found for the plaintiff, and defendant then moved for a new trial for misdirection of the judge; upon this motion the cause now came before the court.

The facts, as appearing from the judge's report, were: In support of her title, plaintiff gave in evidence a copy of the vote of the town of Newbury, of March 8, 1680, granting to William Noyes a piece of land below high-water mark of the Merrimack river, to set a shop upon, not exceeding forty feet in width; also, a copy of another vote, of February 9, 1721, granting Noyes a parcel of land above high-water mark and bounded thereby; and produced a deed executed by the then owners of the land, bearing date November 10, 1740, conveying the two

parcels to T. Perkins, demandant's father. On the twenty-eighth April, 1741, Perkins conveyed the parcels of land to Bennett, who, on the second March, 1742, conveyed one-half the house which had been built on the upland, and of the land on which it stood by metes and bounds, together with one-half the land and flats below the house, in quantity and quality, to Perkins. It appeared that, by the shifting of the channel of the river, the flats were much increased since 1740

The defendant produced in evidence a deed from a committee of the proprietors of Newbury, dated June 15, 1750, conveying, together with some upland, "a piece of flats forty feet in breadth, running from the rear of W. Noyes's grant down to the channel," to Bennett, under whom defendant claimed.

The judge directed the jury that if Perkins had been seised of the flats within sixty years, the increase by alluvion belonged to his heirs; that the grant of 1680, to W. Noyes, extended to low-water mark; that by virtue of the deed from Bennett to Perkins, they became tenants in common of the flats, there being nothing from which a partition could be inferred; that if Bennett acquired any title by virtue of the grant of 1750, it inured to the use of Perkins, who, by the deed of 1742, had been made his tenant in common; and that, if the jury were satisfied with the evidence of the plaintiff's title, she had better right to recover as to all the demanded premises above low-water mark, than the defendant had to hold. Verdict was found for the plaintiff, accordingly, and to each of these directions defendant's counsel excepted.

Putnam, in support of the motion for a new trial.

Jackson, against it.

By Court, SEDGWICK, SEWALL, and PARKER, JJ. This cause has been twice fully tried, once before a court competent to decide ultimately all questions of law which arose in the trial, and the verdict has, in both instances, been in favor of the defendant, with the approbation of the court; yet, as the new organization of the court intervened between the first and second trial, the tenant has the right to take the course he now pursues, and if any misdirection of the judge can be shown, he will have the privilege of a third trial before another jury.

The points in which the judge is supposed to have mistaken the law, are particularly specified in his report of the case before us. The first relates to his construction of the proprietary grant of 1680, which gives to William Noyes, under whom the

demandant's ancestor held "a piece of land below high-water mark to set a shop upon, not exceeding forty feet in width." It is said by the tenant's counsel that no more land passed by the grant than was actually covered by such shop as the immediate grantee may have placed upon it; whereas the judge directed that all the land and flats between high and low-water mark, of the width of forty feet, were the subject of the grant, provided they did not extend more than one hundred rods from the upland; and we are all of opinion that in this decision the judge was correct. Whatever might be the construction of analogous words in a recent conveyance, made in times of precision and accuracy, and when considerable value is attached to flats in the beds of rivers, creeks and coves, it is obvious that to apply rigid rules of construction to transactions which took place early after the settlement of the country, when conveyancing was little understood, and when the mud of a river or harbor was supposed to be worth nothing, would often be attended with injustice, and in many instances subvert the titles to property of almost incalculable value. Whether a mere vote of a proprietary at the present day, without any deed or location in pursuance of such vote, would pass lands from such proprietary to an individual not a member of the corporation, is questionable; but it is well known that almost all the titles which have been derived from proprietors of townships, have nothing better to depend upon than a vote recorded in the proprietors' books; and where a possession was taken in conformity to the vote, and transmitted by the grantee to his heirs or assigns, titles so acquired have been respected and maintained in our courts of law.

Nor indeed can there be any doubt that the construction given by the judge as to the extent of this grant, was conformable to the true intent of the proprietors in making the grant. By the statute of 1641, it was declared that the owners of upland should own the flats to low-water mark, unless these should exceed the distance of one hundred rods from the upland, in which case they were to be restricted to that distance. Under that statute the proprietors of Newbury became the proprietors of all the flats in the river Merrimack down to the channel, that being within the distance before mentioned. Now it is very fairly to be presumed, that in 1680 these proprietors were desirous to settle their townships, and they were inviting mechanics and other valuable settlers by offering them advantageous situations upon the river, situations then of little con-

sideration as to their value, though since become so important. William Noyes applied for a place below high-water mark to set a shop upon, which was granted him. The object of Noyes in seeking such a place must have been an access from the river to his shop. The proprietors take care to limit his extent upon the shore, confining him to forty feet. But they do not limit him towards the river. Is it to be supposed that they intended to reserve the flats between the grantee's shop and the channel to themselves, and so have it in their power entirely to frustrate the manifest object of their grant to Noyes? This would have been an extremely hard bargain on the part of Noyes, had such intention been expressed; but certainly, so unjust a provision ought not to depend upon slight implication.

The common maxim of law, applicable to the construction of instruments, will come in aid of the probable intent of the parties, in ascertaining the legal effect of this grant. Doubtful words and provisions are to be taken most strongly against the grantor, he being supposed to select the words which are used in the instrument. In this grant of the proprietors, they give three sides of the lot which they convey, and leave indefinite the fourth; it must be taken that they intended that the extent of the lot in the rear should be limited only by their claim. And the legal construction of their own words will not be thought to operate vigorously, if we carry our minds back to the year 1680, when, from testimony in the case, we may reasonably infer that the channel ran so much nearer the upland as to leave no flats between Noyes's shop and the channel, worth the attention of the proprietors. But in addition to all this, it appears in the case, that all those who occupied under the grant to Noyes, claimed and used the flats, as they needed them, in the rear of the breastwork, upon which the shop was placed; and this, too, in the view of the proprietors and their agents, for nearly the space of a century after the grant was made; during all of which time no complaint was made by the proprietors, and no act of ownership exercised by them. Here, then, was a practical construction by both parties, sufficient to remove all doubts as to the true extent of the grant. It is true that, in 1750, the proprietors undertook by their deed to convey these flats to Spencer Bennett; but at this time Perkins, the demandant's ancestor, was in possession as tenant in common with Bennett, claiming derivatively under Noyes, the first grantee, and immediately from Bennett himself, who, in 1742, sold to him one moiety of these very flats. Now if anything

passed from the proprietors, it inured to the use of Perkins, as well as Bennett, and on this ground, the claim set up by the tenant, who claims under Bennett, is without foundation.

The second exception to the judge's charge relates to his decision that the deed from Bennett to Perkins in 1742, created a tenancy in common between the grantor and the grantee of the flats in question. Previous to the date of this deed, Perkins had conveyed to Bennett all the flats, as also an upland lot which the proprietors had granted to the same William Noyes in 1721, and by this deed Bennett conveyed back to Perkins one-half of the upland or house lot, by metes and bounds, and one moiety of the flats behind the house in quantity and quality. Can it be doubted that this created an estate in common and undivided in those flats? We are at a loss to imagine any form of words more technically proper for this purpose. But it is said, and this constitutes the third exception, that the parties occupied in severalty, and that this several occupancy was a partition in fact which ought to have concluded against the demandant's action, which is brought for an undivided moiety. Whether there was a several occupancy or not, was matter of fact for the jury; and although the judge intimated an opinion that there was not sufficient evidence to prove it, yet we do not find that he withheld any evidence on this point, nor do we find any evidence in the depositions submitted to us, from which the jury could have inferred that fact.

The fourth exception, relied upon by the counsel for the tenant, respects the opinion delivered by the judge relative to so much of the flats as may have gathered by alluvion since the death of the demandant's ancestor. To give this objection its full force, we must recur to some of the testimony used in the case, by which it appeared that the channel of the river Merrimack, towards its mouth, had considerably receded from the shore on the Newbury side; and some of the witnesses imputed this to the numerous improvements which have been made on the bank of the river and on the flats, by the erection of wharves, etc. It is contended that the ancestor could have been seised only of so much of the flats as existed in his lifetime; and as the demandant has declared on the seisin of her ancestor, she cannot recover more than he was actually seised of. But we do not think much of this objection. It has already been shown that the ancient statute, relative to the subject of flats, annexed them to the adjoining upland, to the distance of one hundred rods from the shore. Whatever increase, therefore,

happened from natural causes, or from a union of natural and artificial causes, within that distance, must be to the benefit of the owner of the upland, or of him who owned the flats to which the increase was attached. This increase is, of necessity, gradual and imperceptible. No man can fix a period when it began, no testimony can mark the exact margin of the channel on any given day or year. The ancestor being seised of the estate of which all the flats now demanded are part, and having the right by law to all such additions as should be made by the gradual retiring of the waters, he must be supposed to have been seised of all which now exists, for no one can show any parcel of which he was not seised. We think the opinion delivered at the trial right on this point; and, further, we think this an instance in which we may safely apply the maxim, *De minimis non curat lex*.

The form of the verdict constitutes the last exception. It is said this is uncertain, and no judgment can be rendered upon it. The verdict is conformable to the nature of the demand, and a judgment thereon will be sufficiently certain to enable the sheriff to execute it by an *habere facias*. We are, therefore, all of opinion that judgment must be entered according to the verdict

PARSONS, C. J., had been of counsel in the cause.

As recent as *Bates v. Santom*, 116 Mass. 120, this case was cited and its authority recognized. It is cited on the point of the ownership of land formed by alluvion, in *People v. Central R. R. Co.*, 42 N. Y. 315. In *Commonwealth v. City of Roxbury*, 9 Gray, 493, the court, citing the case, say: "In the construction of a grant, the court will take into consideration the circumstances attending the transaction, the situation of the parties, the state of the country and of the thing granted at the time, in order to ascertain the intent of the parties." And to this point it is cited in *Ward v. New Eng. Screw Co.*, 1 Cliff. 572.

GRAY v. THE PORTLAND BANK.

[3 MASS. 364.]

STOCKHOLDER'S RIGHT TO NEW STOCK.—A banking company was incorporated with power to create a capital stock not less than a given sum, nor greater than another sum; it commenced business with the smaller capital, and afterwards it was voted to increase the capital to the larger sum. Those who held stock in the capital first raised were held to be entitled to subscribe for and hold the new stock according to their respective shares.

DAMAGES FOR REFUSING TO RECEIVE SUBSCRIPTION.—Where a corporation refused to permit a stockholder to subscribe for the stock to which he was so entitled, it is liable to an action for damages for such refusal, and the measure of damages in such action is the excess of the market value above the par value of the number of shares he was entitled to, with interest on such excess.

ACTION on the case. The facts and the questions presented appear from the opinion of the court.

Prescott and Jackson, for the plaintiff.

Dexter, for the defendant.

SEWALL, J. The plaintiff demands one thousand four hundred and ninety-one dollars and sixteen cents, and five thousand dollars, which several sums he alleges to have been received to his use by the corporation denominated the president, directors, and company of the Portland Bank. And in two other counts he sets forth, more specially, an interest of seventy shares in the stock of the same bank, consisting at first of one thousand shares, and in the privilege granted them by their incorporation to increase their capital stock to the extent of three thousand shares; and he avers that the said corporation, availing themselves of this privilege, did vote and agree upon an increase of their stock to the extent of two thousand shares additional to their first subscription, and that he tendered, seasonably, a subscription of his due proportion in the said additional stock, and the sums of money payable thereon, and demanded his right to subscribe and pay accordingly, and the regular evidence of his additional shares, being one hundred and forty, accruing to him thereon, in the capital stock of the said bank; and that the said corporation have, since that time, by the use and employment of said new capital bank stock, made and received great gain, etc. And further he avers, by one of these counts, that his proportion of the said gain is one thousand four hundred and sixty-four dollars and forty cents, which they refuse to pay him; and by the other, that the gain has been at the rate of ten dollars and forty-six cents upon each of the shares to which he was entitled; but that he was not permitted to subscribe his one hundred and forty shares in the said new capital stock, or any of them, and that the due certificates thereof have been refused to him, and the said gains and profits thereon have not been paid to him. A verdict for the plaintiff has been taken in this action, subject, by the agreement of the parties, to the opinion of the court, upon the evidence in the case, whether

the plaintiff is entitled to recover; and if he is, whether his damages shall be estimated at the value of the dividends made upon one hundred and forty shares of the new stock, or at the advance upon those shares above the par value thereof.

By the "act to incorporate sundry persons by the name of the president, directors and company of the Portland Bank," Joseph McLellan and others, their associates, successors and assigns, are made a corporation, with the usual powers; and it is further enacted, that the capital stock of the corporation shall consist of a sum not less than one hundred thousand dollars, nor more than three hundred thousand dollars, to be divided into shares of one hundred dollars each.

It is proved, that previous to the act of incorporation, the plaintiff had been received as an associate, in which he was allowed seventy shares; and it was admitted on the part of the defendants, that he subsequently became a member of this corporation, and entitled to that proportion of their capital stock. And it appears that, pursuant to the first requisition of one hundred thousand dollars, he paid in seven thousand dollars, his proportion thereof, and received certificates accordingly; and that while the business of the company proceeded upon that capital, his proportion of the dividends accruing thereon was duly paid to his agent. In January, 1802, at a legal meeting of the stockholders, it was voted and agreed that the capital stock should be increased. And by a subsequent vote at the same meeting, the increase is declared to be of the two thousand shares remaining unsubscribed for. A subscription is directed to be proposed for these shares to the original subscribers, their associates previous to the act of incorporation, and to the assignees of such original associates, to whom shares had been transferred, agreeably to the by-laws of the corporation; and the management of this subscription was intrusted with the directors, as a committee of the stockholders. To this committee the plaintiff tendered his subscription, claiming a right to subscribe for one hundred and forty shares of the additional stock. They determined that he was not entitled, and refused to admit his subscription in any part. The facts that the installments for one hundred and forty shares in the additional stock were duly tendered in behalf of the plaintiff, at the periods appointed for the payment into the bank, and that his certificates for those shares were demanded at the bank and refused, are also admitted on the part of the defendants.

Whether the plaintiff has, by these proceedings, sustained

any injury for which he has a right of action against the bank, depends principally upon the inquiry whether the stockholders, or their president and directors, intrusted with the affairs of the corporation, acting in that capacity, or as a committee of the stockholders specially authorized in the affair of the new or additional stock, had authority to exclude the plaintiff from any share therein.

In pursuing this inquiry, I shall endeavor to ascertain the nature and extent of the plaintiff's interest and property in the Portland Bank, at the time when the vote to increase the capital stock was taken. The limits prescribed by the act of incorporation to the capital stock of this bank were, that it should not be less than one hundred thousand dollars, nor more than three hundred thousand dollars. The right to create and employ this stock for the purposes of a bank was vested in the persons named in the act, and in their associates, successors, and assigns. Their interest in the one hundred thousand dollars first paid in, and upon which the corporation commenced business, is not questioned. The doubt which has been raised respects only the power of increasing this stock. This, the stockholders in their vote of January 4, 1802, assumed to be a property not subscribed for, and, therefore, one would suppose, not belonging to them; yet they act upon it as subject to their disposal, and determine that some may be permitted to subscribe, while others are to be excluded; and in a word, that it was new stock, and not an addition of the bank already commenced; and yet it seems to have been understood that the new stockholders would become interested in the original bank house, purchased from the first subscription, and benefited by all the other expenses of the institution, as far as it had proceeded. And thus they undertook to decide that these advantages, procured at the expense of A., were at the disposal of B., or might be taken by him at his will and pleasure, and sold for his benefit, at the market advance on bank stock. The statement of these inconsistencies discovers, I apprehend, very clearly, the mistake in this particular of the stockholders who were assembled at that meeting.

Viewing a corporation of this kind as a copartnership, a power of increasing their stock, reserved in their original agreement, is a beneficial interest vested in each partner, to which no stranger can be made a party but by the consent of each subsisting partner; and it is a power which the subsisting partners must exercise proportionally and according to their

interest in the original stock. Or, considering an incorporation for a bank, as I think it may be more correctly stated, to be a trust created with certain limitations and authorities, in which the corporation is the trustee for the management of the property, and each stockholder a *cestui que trust* according to his interest and shares, then a limitation of the capital to be employed in the trust, that it shall not be less than one sum, and not exceeding a certain greater sum, is not a power granted to the trustee to create another interest for the benefit of other persons than those concerned in the original trust, or for their benefit in any other proportions than those determined by their subsisting shares. It is clear that a power of that kind might be given, but not by the limitation supposed, which plainly relates to one and the same stock. Whether the least or the greatest, or any intermediate sum be employed in it, the trust is the same, and for the use and benefit of the same persons. A share in the stock or trust, when only the least sum has been paid in, is a share in the power of increasing it, when the trustee determines, or rather when the *cestuis que trust* agree upon employing a greater sum, within the limits provided in the purposes of the trust. This view of the subject avoids the objection relied on for the defendants, resting on the circumstance that the shares of this bank are, by the act of incorporation, to be numbered in sums of one hundred dollars each; from which it seems to have been understood that the increase of stock, being to be made by additional shares, requires a new subscription. But the legislature could not intend, in providing this mode of enumeration, to change entirely the nature of the trust established by the incorporation; and to abolish the security of the members first engaging in it in the beneficial interest and property they might acquire in the institution.

Another objection has been stated in the argument for the defendants, which requires some consideration. It is that the act of incorporation provides no means of enforcing payment from the stockholders, whenever an increase of stock should be agreed on. The act provides that the stockholders shall, at their first meeting, determine the amount of payments to be made on each share, and the time when each payment shall be made. And in a previous clause they have authority to ordain, establish and put in execution, by-laws, ordinances and regulations for the government of the corporation, the prudent management of their affairs, etc. If the power of increasing their stock continued after the dissolution of their

first meeting, the power necessarily carried with it the authority of the stockholders to appoint the payments on each share, and enforce them by their by-laws. A vote to increase the capital stock, if it was not the creation of a new and disjointed capital, was in its nature an agreement among the stockholders to enlarge their shares in amount or in number, to the extent required to effect that increase. The shares first paid in became the first installment of the increased capital; and the subsequent payments might be reasonably enforced by providing for a forfeiture of delinquent shares, to be sold and accounted for to the stockholder; the proceeds to be carried to his account, deducting the installments or additional payments required. This course has been, I have some reason to believe, adopted by other similar institutions for a like purpose.

I do not mean to say, however, that a subscription submitted to the consideration of every stockholder, without any exception, or any attempt at exclusion, might not be equally just, and under some circumstances as expedient as a by-law to forfeit delinquent shares. The operation of such a subscription, if it made any difference, would be a relinquishment of shares by the proprietor; but in that case the shares relinquished ought to accrue to the benefit of the institution. If from the progress of the institution, and the expenses incurred in it, any advance upon the additional shares might be obtained in the market, this advance upon the shares relinquished belong to the whole, and was not to be disposed of at the will of a majority of the stockholders, to the partial benefit of some, exclusive of others. The contrary course taken in this instance was, in my opinion, an unjust transfer of shares belonging to the plaintiff to another; or, at least, a refusal to transfer them to the right owner. It has been made a question, whether the corporation are chargeable with this injustice. Upon this it is sufficient to say that the vote which has been construed to exclude the plaintiff was established by the stockholders, and enforced by their committee, specially authorized for the purpose of carrying that vote into effect. So is the evidence. And upon the more general question, whether upon this evidence the plaintiff has entitled himself to any remedy, some authorities may be cited, serving as proof of this point, and also indicating the nature of the redress which the law provides for the injury proved on the part of the plaintiff.

In the case of *The Governor and Company of the Bank of England v. Moffatt*, reported in 3 Bro. Chan. Ca. 262, it appears that the

executors of the will of James Moffatt, and certain trustees named therein, to whom the residue of his personal estate, consisting of certain bank stock, and other various kinds of public stocks, was specifically devised, had applied to the bank for a permission to transfer in a particular manner, which was refused by the bank, and thereupon the executors commenced an action against the bank in the king's bench. This gave occasion to the bill in chancery by the bank praying an injunction to restrain the defendants from proceeding at law, and insisting upon a certain custom of the bank opposed to the claim of the executors. They answered, and admitted the custom and practice of the bank, but insisted upon their right, which, being determined in their favor, the chancellor decreed that the bank ought to permit the transfer as requested, and dissolved the injunction. In the case of *The King v. The Bank of England*, Doug. 524, it was decided that the court will not grant a mandamus to the bank to transfer stock, because there is a remedy by an action on the case if they refuse, which, Lord Mansfield said, would lay for a complete satisfaction equivalent to a specific relief. And in a note subjoined, it appears that a special action of *assumpsit* was afterwards brought on this case against the governor and company of the Bank of England, in which a verdict was found for the plaintiffs, subject to the opinion of the court upon the merits of the case.

In the present case, a specific relief, or a restoration of the stock in the Portland bank, unjustly withheld or transferred, to the injury of the plaintiff, is not demanded by the action, and it is not, it may be supposed, within the reach of this court, by any authority they can exercise. The dividends which have accrued on these shares, would make a part of a specific relief, if that could be granted; but they are not to be estimated in determining upon an equivalent for shares not transferred, and which have become the property of another person, to whom the dividends have been paid, or are due. It is inconsiderable, too, in this view of the subject, that the plaintiff made no payment of stock; and that, after tendering it, he was not obliged, in order to enforce his demand in this action, to deposit his money or hold it unemployed.

Upon the whole, I am of the opinion that the plaintiff's loss in this case will be compensated; by allowing him the market value of the shares he was entitled to at the time when he demanded his certificates, and they were refused to him; which, according to the evidence, was on the eleventh of February,

1804; that is, the then current advance upon shares in the Portland bank. Then it was that the injury by the defendants was complete, and then the plaintiff might have determined the extent of his loss, by a purchase of the number of shares denied him, at the expense of the advance upon them; which being reimbursed in this action, affords him a satisfaction and indemnity equivalent to a specific relief. To the amount, however, of the advance upon one hundred and forty shares, must be added the interest of that sum, to the time when judgment shall be entered, in the nature of increased damages.

SEDGWICK, J. [after reviewing the facts.] Upon these facts the counsel for the plaintiff contend:

1. That the plaintiff, as a stockholder of the old stock, at the time of the vote to augment the capital of the bank, had a right in the new stock, in proportion to the amount of his interest in the old stock, of which he could not rightfully be deprived by his partners, the other stockholders;

2. That, admitting it was competent to the stockholders, by the manner in which they prescribed the augmentation of their capital, to prevent him from becoming a subscriber to and interested in, the new stock, they have not done it; but, on the contrary, have expressly, by their vote, authorized him to subscribe to the new, in proportion as he was interested in the old stock;

3. That the plaintiff, having offered to subscribe in the new stock, and to pay, as it became due, the amount of his subscription, and having been prevented from subscribing, and his payments having been refused by the agents and officers of the bank, he has sustained an injury;

4. That for the misconduct of its servants, the bank is responsible to the plaintiff;

5. That the plaintiff, having done everything incumbent on him to become a proprietor in the new stock, is interested in it, and consequently is entitled to his proportion of the dividends upon that stock.

All these propositions are denied by the counsel for the defendants. To determine on them will decide the merits of the case.

1. Then had the plaintiff, as a stockholder of the old stock, at the time of the vote to augment the capital of the bank, a right in the new stock in proportion to his interest in the old stock, of which he might not rightfully be deprived by his partners, the other stockholders? I think that he had. At the

time of the vote to augment the capital of the bank, all the stockholders were partners. The augmentation was supposed to be, and intended for, the profit of the joint concern; the capacity to augment was in virtue of their joint interest; and it could only be done by the will of the majority, and that in pursuance of their original association. The law, by which the partnership existed, and by which the united interest was regulated, was that alone by which the augmentation could be made. Whenever a partnership adopts a project, within the principles of their agreement, for the purpose of profit, it must be for the benefit of all the partners, in proportion to their respective interests in the concern. Natural justice requires that the majority should not have authority to exclude the minority. What is there in this case which should make it an exception from the general rule? There is nothing that I can perceive, in the reason and nature of the thing. Suppose it to have been morally certain that the augmentation would have been double in value to the amount of money necessary to make it; could a combination of a majority have deprived the minority of their proportion? The whole number of shares was one thousand; could the proprietors of five hundred and one have engrossed the whole, and deprived their partners of their share? It is impossible. At the time of the vote to augment the capital, a banking-house had been purchased and become the property of the institution. In this Mr. Gray was personally interested in proportion as his interest in the bank was to the amount of the whole stock. After the capital is increased, the banking-house is, as it was before, the joint property of the stockholders; and the consequence of excluding him from the new stock without any compensation, is depriving him, without any consideration, of two-thirds part of his property in this house. This shows, in a very glaring light, how unfounded is the principle for which the defendants contend.

2. By the terms of the vote designating those who should be authorized to subscribe to the new stock, the case of Mr. Gray is expressly included. He was an associate with the original subscribers, or an assignee of them, previous to the act of incorporation. This is evident from the application by those concerned to his agents; from his being furnished with the shares in the manner detailed in the evidence; from the notice which was issued to him to pay his proportion of the capital; and from the certificates of ownership which were afterwards issued to him as a proprietor. So that if it was competent to

the stockholders, as they say, to decide who should be interested in the new stock, and be authorized to subscribe to it, the plaintiff had undoubtedly the right which he claimed, and which he says has been violated. How this could have been misunderstood by the committee and officers of the bank is, from the evidence given at the trial, to my mind, perfectly unaccountable. I do not, however, mean to accede to the practical exposition which the corporation claimed by their vote, of excluding any of the stockholders from subscribing, if they pleased, to the new stock; but from what has been said, I think it evident that from any view that can be taken of the subject, Mr. Gray had a right to subscribe to the new stock. From hence it follows:

3. That the plaintiff having offered to subscribe to the new stock, and to pay as it became due, the amount of his subscription, and having been prevented from subscribing, and his payments having been refused by the agents and officers of the bank, he has thereby sustained an injury.

4. The plaintiff says that the bank is responsible to him for that misconduct of its agents and officers of which he complains; and I think the position a correct one. That principals and masters should be responsible, *civiliter*, for the misconduct, negligence and defaults of their agents and servants while acting under the authority delegated to them, is indispensable to the security of the rights and property of all who may be affected by such misconduct, negligence, or default. This principle, the justness of which all must readily perceive, has been so frequently recognized in courts of justice, that a reference to authorities is deemed superfluous. I will, however, repeat what is said by Mr. Christian in his notes on Blackstone's Commentaries, as the reason on which this principle of law rests. "The law," he says, 1 Bl. Com. c. 15, n. 13, "which obliges masters to answer for the negligence and misconduct of their servants, though often times severe upon an innocent person, is founded upon principles of public policy, in order to induce masters to be careful in the choice of their servants, upon which both their own security and that of others so greatly depends." In no case is this principle of so much importance as in the relation of corporations to their servants, because in innumerable instances, they cannot act but by their agents, and there would be no security for those who might be affected by the acts of the agents, if they should abscond or be insolvent. This shows how improper it would be, as contended for by the

counsel for the defendants, to oblige one injured in this way to resort for his remedy to the agent.

5. The last proposition of the plaintiff is, that he, having done everything incumbent on him to become a proprietor in the new stock, is, in fact, interested in it, and consequently that he is entitled to his proportion of the dividends upon that stock. It cannot but be admitted that Mr. Gray, by offering to the committee appointed by the stockholders, to subscribe for his proportion of the new stock; by his demanding of the proper officers certificates of ownership of that stock, and by tendering, at the proper place, the amount to be paid for the stock which he claimed, has become as much entitled to claim to be a proprietor, as he would have been if he had actually subscribed and paid his money, and the certificates which ought to have been given to him had been given to other persons. In this case, he has a right to a complete indemnification; and in that he would have no more. One question involved in the argument, and referred to our decision, is whether the plaintiff is entitled to recover the dividends of the new stock. If so, it must be because he is owner of the stock, which I think he is not. I have always understood that the registry of ownership, kept by the officers of the bank, was, to them, the only evidence of it, nor can I understand how, in any other way, their business could be conducted; and that to the individual stockholder his evidence was his certificate. Suppose a valid contract is made for the future sale of lands, and the agreed price is tendered, and the conveyance stipulated is demanded and refused, and an action for the breach of the contract brought; the plaintiff, at law, would recover, not the land, but damages equivalent to the injury sustained. It is true there can be no title to real estate but by deed, and that this is required by statute; but it seems to me, from the nature of the subject, that a title of ownership of bank stock must exist in writing, and not merely in parol. How otherwise can the officers of the bank know to whom to pay the dividends? And how are transfers of this species of property to be made and secured? In the case put of a breach of contract in not conveying real property, this court has no means of effectuating a specific performance of the contract; and there is the same deficiency of power in the present case.

By the act of incorporation, the amount of the capital of the bank cannot exceed three hundred thousand dollars, and it was agreed in the argument that there were subscribers, whose

names were entered on the books of the bank, who had deposited to that amount; that the subscriptions were full, and that the capital could not be augmented. Had we power, therefore, to consider Mr. Gray as the proprietor of the one hundred and forty shares, for which he ought to have been permitted to subscribe, could we even compel the bank to constitute him such, we must exclude other subscribers to the same amount; subscribers who for years have been, in all respects, treated as stockholders, who may have been directors, who have the regular and accustomed evidences of ownership, and who have received, from time to time, their dividends; or we may exclude shares which have been a hundred times transferred. What endless confusion and disorder, and what incalculable mischiefs might result from such a procedure! But which shares are to be excluded? It is said those last subscribed. Does any one know which were last subscribed? It is said that this may be known by the numbers. But we have no evidence that the series of numbers conforms to the order of time in which the subscriptions were received; nor do we know that any such evidence can be obtained. But if it could, what is there, in justice or in the nature of the thing, that should subject the last subscribers to exclusion? There is no evidence that they did not, as honestly as any other, contract with the officers of the bank, and become as fairly interested in the concern.

Let the supposition be made that the plaintiff could recover dividends on the new stock; it must be because he is, in fact, a proprietor. Some who obtained certificates, and paid their money for them, or their assigns, must of course be excluded. What answer could be given to an action brought for dividends by those so excluded? None, I believe, that would avail the bank. But if there could, what endless confusion and difficulty must have attended the adjustment of all the controversies which might result from transfers of such stock. And what confidence could there be in the purchase of bank stock, if certificates, duly obtained, are not to be relied upon as evidence of ownership?

But it is said by the plaintiff's counsel, if I understand them, that none could be interested in the new stock who were not interested in the old; and in the same proportion, I have no doubt that every proprietor of the old stock had an election, and might, if they pleased, in proportion to their property in the old, become interested in the new stock; but I do not think they could be compelled to subscribe; and I do think that they

might relinquish that right, or that it might be forfeited by not being claimed; and that in either case other subscribers might be admitted to supply the deficiency.

1. They could not be compelled. The shares might be the property of infants, or they might be owned by persons in Europe or India. What compulsion could be used in either case? Could an action, even if all the stockholders were within the reach of the legal process of this court, be supported? I have never heard of any such action, and I presume none could be supported. This, indeed, is not pretended; but it is said that the old stock could be sold if the proprietor neglected to subscribe to the new. Admitting that this was so, it might not afford a remedy; for, by a sale of the old stock, the capital required for the new might not be procured. For every hundred dollars of the old, two hundred dollars of the new was to be supplied; to attain the object in this way, therefore, the shares of one hundred of the old, with two shares of the new stock, must bring two hundred, which, it may be conceived, it would not do. But if this is not such an hypothesis as to afford foundation for an argument, yet a purchaser of the stock would be no more bound to subscribe than the original holder was; and if unwilling or unable to make the requisite advances, the bank would be in precisely the same situation after as before a sale. A sale, therefore, might not be effectual; and if it would, the great purposes of augmenting the capital of the bank might be defeated by the delay. Besides, how could such a sale be reconciled to justice in the cases of infants *feme covert*, and foreigners?

2. It will not, I presume, be denied, that the right of the original stockholders to subscribe to the new stock might be voluntarily relinquished. The maxim that *volenti non fit injuria*, will with as much reason apply in this as in any instance that could be mentioned.

3. The rights of the original stockholders might be forfeited by not being claimed within a reasonable time. Taking into consideration the nature of the corporation, and the purposes for which an augmentation of the capital was designed, I am of opinion that the stockholders, when they determined to augment their capital, ought to have given a reasonable time to all their partners to have claimed and exercised this right of subscribing to the new stock; that all who were partners must be presumed, by themselves or their lawful agents, to have notice of all the legal acts and votes of the corporation; and that if

any in this case neglected to subscribe, after a reasonable time, strangers or other stockholders might lawfully be admitted to the shares so relinquished. Any other construction would, it seems to me, be followed by consequences so embarrassing as might wholly defeat the purposes intended by the vote to augment the capital of the bank. The opinion that the right to subscribe to the new stock could not be relinquished voluntarily, or lost by not being claimed, leads to these consequences; that the shares of infants, foreigners and those who were unable to advance money for the new stock must be sold; and that none could become proprietors of the new, but those who were proprietors of the old stock; and to me it seems that from thence it would follow that all other subscriptions were void, and that no title was thereby derived to them or their assigns. If, then, shares might be relinquished by the stockholders, or forfeited by not being claimed within a reasonable time, those who contracted for them, with those who were duly authorized to make such contracts, and who have advanced their money according to the terms prescribed, have acquired a vested interest, which cannot be defeated, because the plaintiff had sustained the injury of which he complains. In any view of the subject, I cannot think that the plaintiff is entitled to any part of the dividends which have been made upon the new stock.

I have been able to find very little in the books which bears directly on the subject. I have, however, found two cases which are in point. In the case of the *S. S. Company v. Curson*, 20 Vin. Ab. 5 pl. 15, the cashier of the S. S. Company received money for a subscription, but did not enter the respondent's name in the book. The respondent recovered the money against the company. Two things, very material in the determination of the case under consideration, are proved by this case: 1. That the company is responsible for the acts of their officers; 2. That the receipt of the money did not make the respondent one of the company, but only entitled him to an action for the money paid. And in the case of *Stockdale v. S. S. Company*, 2 Atk. 141, it was determined that the person whose name is entered in the S. S. Company's books, is, with regard to them, the proprietor, and they had no right to inquire who the true proprietor is, when the trust does not appear. This resolution seems dictated by sound sense; and I see no other way, as I have already suggested, how the business of such kind of companies could be conducted with regularity or intelligence.

As Mr. Gray is entitled to recover against the bank, it only remains to prescribe to the referees to be appointed, the measure of his damages. From consideration, I am of opinion that his damages are to be ascertained by the price of the stock in the market at the time of the payment of the last installment, deducting therefrom the money which was actually to be paid; and I see no reason why interest from that time should not be added. It is true that this is contrary to the case of *Shepherd v. Johnson*, 2 East. 211, in which it was determined that the price of the stock, on the day of trial, should be the measure of the damages. The decision in this case is directly opposed to that of *Dutch v. Warren*, 2 Burr. 1010; 1 Str. 406, and the case of *Saunders v. Kentish et al*, 8 T. R. 162. It is also contrary to the rule long established and invariably adhered to here. It would promote uncertainty and occasion litigation to question a rule so long established upon a subject of such general interest; and for that reason, as well as because I think the rule will most frequently do justice, I am disposed not to disturb it. It is true no general rule could be adopted, which might not, in particular instances, be injurious. But it is important that a general rule should be established and known; and as such, I think none so reasonable as that which has been, as far as I know, invariably adhered to here, that the price of stock at the time it should be transferred or delivered (and the same rule applies to other personal property), shall be that by which the damages shall be assessed. If the plaintiff intends to retain the stock, the then price is what he must pay for an equal amount, and if he intends it for sale, that price is what he would obtain for it.

To apply this principle to the case under consideration, when Mr. Gray had tendered the last installment, he had completed everything incumbent on him to do. If no injury had been done him, he would have been the proprietor of one hundred and forty shares of the stock. The loss to him, therefore, is the difference between the money paid and what he could have sold that amount of stock for in the market. As soon, therefore, after the payments on the new stock were completed, according to the vote of the stockholders, as the stock had obtained a market price, that price is to be the basis of the calculation of the referees; and when upon it they shall have found a principal sum, to which the plaintiff is entitled, to repair the injury which he has sustained, they will add the interest from that time.

The reporter remarks as follows in a note to this case: "The Chief Justice having been of counsel in this cause while at the bar, and PARKER, J., being a stockholder in the Portland Bank, neither of them sat in the cause. After SEDGWICK, J., had delivered the foregoing opinion, he observed that THATCHER, J., after hearing the argument, was of opinion that the plaintiff was entitled to recover, but it was not recollected that he expressed any opinion as to the measure of damages, on which subject SEDGWICK, J., wrote to him the first day of the present term, but had not received an answer."

Sedgwick on Damages, p. 267, notices and criticizes this case. He had laid it down that where a purchaser had paid the price in advance, and had failed to have delivered to him the property, the measure of damages was held, in some places, to be the difference in value from the time when a delivery should be made, up to the time of trial. Then he says: "This distinction between contracts executory and partially executed does not appear to be recognized in Massachusetts. An action was brought against a corporation which had increased its capital, by an original subscriber, for not permitting him to subscribe for new stock. The point decided by both the judges who delivered opinions was, that the chattel not being paid for, the price at the time of delivery was the rule of damages. The language, however, of SEDGWICK, J., is very broad; he says: 'The general rule, invariably adhered to here is, that the price of stock at the time it should be transferred or delivered shall be that by which the damages shall be assessed; and the same rule applies to other personal property.' But it will be noticed that the price of the stock had in this case only been tendered."

On the point of the measure of damages the case is cited in *Sargent v. Franklin Ins. Co.*, 8 Pick. 99; *Bush v. Canfield*, 2 Conn. 490.

FLOYD v. DAY.

[3 MASS. 403].

TROVER, WHEN NOT MAINTAINABLE.—An agent compromised a demand of his principal, by receiving a negotiable note indorsed to the agent specially; it was held that the principal was not entitled to maintain trover for the note against the agent; but the latter became immediately answerable for the amount liquidated as for so much money received by him to the use of his principal.

TROVER for a promissory note. A verdict was taken for the defendant, subject to the opinion of this court upon the following facts: The plaintiff, having a demand against one Pilsbury, for getting her with child, made defendant her attorney for the collection of the same. As a compromise, Pilsbury agreed to give three hundred dollars for a release in full, and specially indorsed to defendant a note for six hundred dollars, the note in question, the sum of three hundred dollars having been previously paid thereon. For the interest still due on the note, Day gave his own note to Pilsbury, and on behalf of the

plaintiff executed a discharge in full. Plaintiff afterwards demanded the note of defendant, who refused to deliver it up. It was agreed that Day collected one hundred dollars on the note and paid the same to plaintiff, except thirty dollars, which defendant retained with plaintiff's consent.

The jury were directed that the special indorsement and the other circumstances in evidence had made the note the defendant's property; and although he might be accountable for the amount of it in another form of action, yet that he was not liable in this action.

Livermore, on behalf of the plaintiff, in support of a motion for a new trial, contended that the note vested in the plaintiff on its delivery to her agent, that a right to possession was sufficient to maintain an action of trover; that defendant had been guilty of a tortious conversion: Bull. N. P. 85; 1 Salk. 289; Lofft's R. 38; 1 T. R. 56.

Prescott, for the defendant, was stopped by the court.

By COURT. As the plaintiff has an equitable and conscientious demand against the defendant, the court has endeavored to discover some legal grounds on which she may have a remedy by this action. But no such principles are recognized. The plaintiff having a demand upon Pilsbury, constitutes the defendant her agent to recover for her a sum of money in satisfaction for her demand. The defendant, instead of money, receives a note of Pilsbury, made payable to himself, and discharges Pilsbury, as he was authorized to do, by the plaintiff; or if there was no previous authority, she has since ratified the discharge, so that she has no remedy but against the defendant. The note was for a sum larger than the liquidated damages, and the difference was paid by the defendant to Pilsbury.

For this note the plaintiff has sued this action of trover; and to maintain it she must prove a general or a special property as against the defendant. These facts do not prove this property. If the note is to be considered as the property of those who are entitled to the money due on it, then shall it be the joint property of the parties, for which neither could maintain trover against the other. If the defendant, on demand by the plaintiff, had delivered her the note, she could make no use of it. For what purpose, then, can she claim a property in it? In fact, when the defendant, instead of money received this note of Pilsbury and discharged him, the property of the note was in the defendant; and he became immediately answerable

to the plaintiff for the amount of the liquidated damages, which made a part of the consideration of the note, as so much money received by him to her use, and an action of *assumpsit* is her proper remedy. For although the defendant received no money, yet by his transaction he discharged Pilsbury from the plaintiff's demand on him for money, and he must be considered as having made himself answerable to her for the money he ought to have received of Pilsbury.

Judgment according to verdict.

The authority of this case was recognized by the court in *Randall v. Rich*, 11 Mass. 498; *Whitwell v. Vincent*, 4 Pick. 452; *Appleton v. Bancroft*, 10 Met. 237; *Morrill v. Brown*, 15 Pick. 177; *Perry v. Swasey*, 10 Cush. 40; *Bartlett v. Bramhall*, 3 Gray, 260; *Rundle v. Allison*, 34 N. Y. 182, to the point that when one authorized to collect the debt of another, takes a note in his own name in liquidation, he is liable to the person employing him as for so much money had and received.

GOODWIN v. JONES.

[3 MASS. 514.]

FOREIGN ADMINISTRATOR.—An administrator who has taken letters of administration under the authority of one state, is not entitled to prosecute or defend an action in the courts of another state by virtue of such letters of administration.

ACTION OF ASSUMPSIT. The facts of the case are stated in the opinion.

By Court, PARSONS, C. J. This question comes before the court on the motion of Nathaniel Goodwin, that he may be admitted to prosecute a suit, pending in this court, and commenced by Daniel Goodwin against Ebenezer Jones. The facts on which this motion is founded are, that Daniel Goodwin, of Hartford, in the state of Connecticut, sued on the original writ in this cause against the said Jones, in an action, the cause of which by law survives to his executor or administrator; that he prosecuted this action until the same was regularly pending in this court by appeal, and then he died; and that at the next term Nathaniel Goodwin, of the same Hartford, having obtained from the probate court, for the district of Hartford, under the authority of the state of Connecticut, administration of the goods and estate of the said Daniel Goodwin, moved the court that he might, in his said capacity, be admitted further to prosecute this action against the said Jones.

The motion is founded on the statute of this commonwealth, 1784, March 4, c. 32, which provides that when an action is pending, the cause of which will survive, if either party die, his executor or administrator may take upon himself the prosecution or defense of the action. And if an administrator, deriving his authority from the laws of any other state, is within the true intent of this statute, the motion ought to be granted. As this statute extends only to actions, the causes of which survive to the executor or administrator, it is manifest that the administrator cannot be admitted to prosecute this action, unless he could have originally commenced an action for this cause, in a court of this state after his intestate's death, by virtue of his letters of administration granted in the state of Connecticut. The motion may therefore be considered as requiring a decision of the question, whether an administrator, by virtue of his administration granted in any other state, can maintain a personal action, founded on contract, in any of the courts in this state.

The counsel in favor of the motion have argued that all the personal estate of any person, wherever it may be, follows the person, and must be governed by the law of the place where the owner has his domicile; and they have compared an administrator to the assignee of a bankrupt, who may sue to recover the bankrupt's effects in any state where they are found. It is admitted that the assignee of a bankrupt duly appointed, pursuant to the laws of the state where the bankrupt dwells, may maintain an action in that character in any other state, the laws of which are not repugnant to his recovery. And it is also admitted that the personal effects of a deceased intestate, remaining after his debts are paid, shall be distributed according to the law of the state to which, at his death, he was subject. But it may be questioned whether the interest the administrator has in the personal estate of the intestate is as general as the interest of the assignee. The assignment of a bankrupt's effects may be considered as his own act, as it is in the execution of laws by which he is bound, he himself being competent to make such assignment, and voluntarily committing the act which authorized the making of it. The administrator's powers result from the provisions of law made to dispose of the intestate's effects after his death had extinguished his property in them; and these provisions cannot extend to the effects not within the jurisdiction of the state from which such provisions of law derive their force.

The common law limits the power of the ordinary in granting administrations to goods within his diocese; and if the intestate left *bona notabilia*, the granting of administration belongs to the metropolitan, whose power is limited to his own province. An administration granted by him does not extend to Ireland, though under the same sovereign; for if a man dies intestate in London, having goods in London and in Dublin, administration of his goods in Dublin must be granted in Ireland: Gibs. 472. On this principle of the common law, an administrator appointed in Connecticut cannot claim the effects of his intestate that were not within that state at his decease. But if it be admitted that an administrator so appointed might claim, on general principles, the intestate's goods in this state; yet that claim cannot be enforced if the laws of this commonwealth are repugnant to it. Before we consider some of these laws relating to this subject, two principles are to be premised as unquestionable: That the title to, and the disposition of, real estate must be exclusively regulated by the law of the place in which it is situated; and that there cannot be, at the same time, two administrators holding distinct and independent rights to administer the same goods of the same intestate.

An administrator in this state has all the powers over the goods of the deceased, which is possessed by an administrator at common law; and he must administer all the goods, chattels, rights and credits of the intestate, which are within the state. And further, by our laws, the real estate is assets in the hands of an executor or administrator, to pay the debts of the deceased, if his personal estate be insufficient, and may be sold by him on obtaining a license. If the estate be insolvent, he must pay all the creditors their demands *pro rata*, the real as well as the personal estate of the deceased, composing the fund. If any judgment be recovered for a debt due from the deceased, the lands which were his may be taken to satisfy the judgment; and for this purpose the law considers them as in the hands of the executor or administrator, and charges him with waste, if by his neglect, in satisfying the judgment, the lands were so taken. He may satisfy any judgment recovered by him, by extending his execution on the lands of the debtor. And he may maintain a real action to foreclose a mortgage of lands, declaring on the seisin of the deceased, and the lands extended on, or mortgaged, he may, on obtaining license, sell for the payment of the deceased's debts. And in all cases where he shall sell lands for the payment of debts, he must account for the

proceeds to the judge who granted him administration, who may, in the two last cases, allow the charges of administration to be a lien upon the land.

From a view of these statutes, it is very certain that the administrator on whom these duties are enjoined, and to whom this power is given, must derive his authority from the laws of the commonwealth. He has the disposition of lands, and for their proceeds he must account to the judge of probate, to whom no administrator can be compellable to account, unless he who received his administration from the judge. On one of the statutes a judicial decision has settled the point. *Sherburne*, an administratrix, sued *Emery* in the county of York, in a real action to foreclose a mortgage. The intestate, living and dying in New Hampshire, the administration was there granted; and it was held by the whole court that the action for that reason was not to be maintained. The administratrix afterwards took out letters of administration in York, and foreclosed the mortgage.

If this motion should prevail, and the personal assets of the deceased be insufficient to pay his debts, how could his lands in this state be assets in the hands of the present administrator? Or, if in this action he should recover judgment against *Jones*, and satisfy that judgment by a levy on the debtor's lands, by what legal process could those lands be made assets for the payment of the intestate's debts? When any person, an inhabitant of another state, shall die intestate, but leaving real estate within this commonwealth, if administration should not be granted by some judge of probate of a county in which the estate lies, there would be no legal remedy for the creditors of the deceased to avail themselves of his real estate for the payment of the debts due to them. Therefore, to prevent a failure of justice, administration in such case must be granted by some probate court here; and the administrator so appointed, will, by virtue of his letters of administration, and of the laws, also have the administration of all the goods, chattels, rights and credits of the intestate which were within the state. And if a foreign administrator of that intestate should also have the administration of his personal estate here, there would exist two administrators of the same goods of the same intestate, independent of each other, and deriving their authority from different states, a consequence which cannot be admitted. But the granting of administration here cannot divest the foreign administrator of any rights already vested in him; and the neces-

nary inference is, that whether administration be or be not granted in this state, an administrator appointed in another state cannot legally claim any interest in the goods of his intestate, which are subject to an administration granted in this state. And it is no objection to this reasoning, that debts due to the intestate on simple contract are to be considered as goods situate where he dies. For if the position be admitted, contrary to the authority of Wentworth, in his executor, page 46, where it is supposed that such debts are *bona notabilia* where the debtor lives; yet the administrator, if he recover judgment on such contract in this state, may satisfy it by an extent on lands, which certainly, in their disposition, are exclusively subject to the control of the laws of the commonwealth. We have no particular statute relating to foreign administrators; but the manner in which an executor of a will proved without the state may execute his trust within, is regulated by the statute of 1785, June 29, c. 12. The executor, or any person interested in any will proved without the state, may produce a copy of it, and of the probate under the seal of the foreign court which proved it, before the judge of probate of any county where the testator had real or personal estate whereon the will may operate, and request to have the same filed and recorded, which the judge, after notice and hearing all parties, may order to be done; and he may then take bonds of the executor, or may grant administration *cum testamento annexo* of the testator's estate lying in this government not administered, and may settle the estate, as in cases where the will has been proved before him. This statute needs no explanation. The executor of a will proved without the state cannot intermeddle with the effects of the testator in the state, but with the assent of a judge of probate, to whom he must first give bond. Neither can an administrator with the will annexed intermeddle, unless he is appointed by some judge within the state, who has authority to settle the whole estate within his jurisdiction. And it would be inconsistent with the manifest intent of the statute to allow an administrator of an intestate not an inhabitant or resident within the state at his death, an authority derived from a foreign administration, which he could not have under the foreign probate of a will, of which he was the executor.

To obviate the inconvenience from the existence of two administrators, each having an independent right to prosecute a suit for the same cause of action, if a foreign administrator be allowed to prosecute a suit in the courts of the commonwealth,

it has been said that our courts of probate cannot now grant administration of the goods and estate of a person who was not an inhabitant, nor resident within the state at the time of his death. This objection deserves some consideration. The statute of 1784, March 12, c. 46, erecting the present courts of probate, enacts that a court of probate shall be held in each county by a judge for taking the probate of wills and granting administrations of the estate of persons deceased, being inhabitants or residents within the same county at the time of their decease; and for such other matters and things as the courts of probate within the several counties shall, by the laws of the commonwealth, have cognizance and jurisdiction of. It appears from the latter part of the section, that this court, thus established, has general jurisdiction of all probate causes recognized by law. And all laws of the late province, not repugnant to the constitution, nor since altered or repealed, now remain in force. The charter grants that the governor of the province, with the counsel, may do, execute or perform all that is necessary for the probate of wills, and granting administrations, for, touching or concerning any interests or estates, which any person or persons shall have within the province, without any restrictions to persons, who were inhabitants or residents at their death. Under this charter, no inferior courts of probate were erected by statute; and the judges of probate in the several counties acted as the deputies of the governor, and counsel, who were the supreme ordinary; and their powers were recognized, and their proceedings regulated by several acts of the provincial legislature. But no statute was ever passed limiting the probate jurisdiction, as granted in the charter. In cases, therefore, where the deceased, not an inhabitant or resident, left at his death any interest or estate within the state, the present courts of probate have jurisdiction. It may be added, that the former part of the section contains no negative words; and that the limitation there inserted, was probably introduced to regulate the jurisdiction of the several courts of probate, when the deceased was an inhabitant or resident. When the deceased intestate was not an inhabitant or resident, administration may be granted by the judge of probate of any county where the estate lies; and from analogy to the several statutes relative to the powers of administrators, and to the jurisdiction of probate courts, the person first obtaining administration will have legal authority to administer all the estate of the intestate, although it may lie in several counties of the commonwealth.

Upon fully considering this subject, it is the opinion of the court that the motion cannot be granted, and that judgment be entered that the writ is abated by the death of the original plaintiff.

We are sensible that the courts in Connecticut admit administrators receiving letters of administration in another state, to prosecute personal actions in those courts. This usage probably arose from an agreement of the four New England colonies, made in the year 1648, that if any known planter or settled inhabitant die intestate, administration shall be granted by the colony to which the deceased belonged, though he died in another colony, and that the administration, being duly certified, shall be of force for gathering in the estate in the rest of the colonies: Hazard's Collection, vol. 2, p. 124. An intercommunity of the rights of administration among neighboring states, in which lands are assets for the payment of debts *in pari passu*, with full power to settle the whole estate, in whatever jurisdiction it might lie, would, in many cases, especially where there was a deficiency of personal assets to pay all the debts, be very convenient. But a comity of this nature must result from the provisions of the legislature, and not from the judgments of this court.

Writ abated.

PUTNAM v. WOOD.

[3 MASS. 481.]

LIABILITY OF OWNER TO FREIGHTER.—The owner of a ship carrying goods on freight upon a circuitous voyage is bound to have her in a state of repair, at every port where she may be; and he is liable to the freighter for any damage to the goods for want of such repairs, no matter whether the defect in the ship was known or unknown to the ship owner.

SHIPPING CONTRACT—ON WHOM LOSS FALLS.—Upon a contract of affreightment, where the shipper assumes the perils of the sea, and the owner is to receive a share of the profits in lieu of freight, if damage be caused by the perils of the sea, the loss is to be deducted out of the profits, so as to be sustained by the owner and freighter jointly.

ACTION on the case. The following facts appear from the report of Sewall, J., before whom the cause was tried: The plaintiff shipped on board the defendant's brig, bound from Newbury port to the East Indies, three thousand dollars, which sum was to be invested in produce of that country, and brought home in the brig on plaintiff's account, and at his risk. In lieu

of freight on the money out and goods home, and of commissions on the purchases to be made, defendant was to have one-half of the net profits. The vessel, after touching at the Isle of France, and Batavia, arrived at Calcutta August 1, 1804. After leaving Batavia, part of the sheathing was found to have been beaten off during a severe gale, and on reaching Calcutta all the repairs that appeared necessary, without taking off the sheathing, were made. The captain then began taking in the homeward cargo, but on the eleventh of August, when about two-thirds full, a leak was discovered. All proper measures to prevent injury to the cargo were taken, and the damaged portions sold at auction; and on the fourteenth of August, a survey was had, and such repairs as were recommended were made. A full cargo was then received on board, with which the vessel arrived in Newburyport in safety. That portion of the cargo which had been damaged was purchased with the money of the plaintiff, and other shippers, and of the owner, on a general account, without distinction, and the proportion of the loss and expenses incurred in consequence of the leak, estimated upon the plaintiff's shipment, was three hundred dollars and one cent. This sum defendant retained in settling his account with plaintiff, and for its recovery this action was brought. There appeared to be no lack of diligence on the part of the officers and crew in discovering the leak and securing the cargo.

The judge directed the jury that, taking the most favorable view of the case for the defendant, the loss ought to be divided between the parties in the same proportion as were the profits. Verdict for the plaintiff accordingly, subject to the agreement that, if this court should be of opinion that defendant is entitled to no deduction on account of the leakage, then plaintiff to recover the three hundred dollars and one cent; and that if plaintiff ought not to recover anything in this action, then verdict to be entered for the defendant.

Livermore, for the defendant, argued that it was sufficient that the vessel was seaworthy at the commencement of the voyage; that the subsequent damage arose from perils of the sea, which plaintiff had expressly assumed; that to make defendant liable for the loss would be to charge him as insurer, contrary to express stipulation.

Jackson, for the plaintiff, contended that a shipper is liable for all damage to goods shipped, which might have been prevented by human foresight; that at every port where the ship

may be, all necessary repairs must be made; that in any event, the loss ought to be deducted from the profits, and not from the principal adventure.

By Court, PARKER, J. [after reviewing the facts.] The defendant claims a right to deduct the whole sum from the plaintiff's adventure, contending that it is a proper charge against him, being caused, as the defendant alleges, by perils of the seas, for which the plaintiff alone was accountable. But if he has not a right to retain the whole, he contends that the loss ought to be divided between the plaintiff and himself, and therefore that he has a right to retain one moiety thereof. On the other hand, the plaintiff contends that no part of this sum is properly chargeable to him, because, he says, that the loss was occasioned by a defect in the vessel at the time she received the cargo on board at Calcutta, and that by such a loss, the defendant alone being owner of the ship, ought to be the sufferer.

If the loss was occasioned by the perils of the seas, according to the legal meaning of those terms, the plaintiff cannot maintain his action; because in the bill of lading which is referred to by the parties in their contract, that risk is agreed to be taken by the plaintiff himself. But we are of opinion that the facts do not show that the loss happened from this cause. The gales which were met with on the outward passage, did no essential injury to the vessel; it was not found necessary to repair her at the Isle of France or at Batavia; but when she arrived at Calcutta, she was repaired with a view to fit her for her return voyage, although not sufficiently.

It is the duty of the owner of a ship, when he charters her, or puts her up for freight, to see that she is in a suitable condition to transport her cargo in safety, and he is to keep her in that condition, unless prevented by perils of the sea, or unavoidable accident. If the goods are lost by reason of any defect in the vessel, whether latent or visible, known or unknown, the owner is answerable to the freighter, upon the principle that he tacitly contracts that his vessel shall be fit for the use for which he thus employs her. This principle governs, not only in charter parties and in policies of insurance, but it is equally applicable in contracts of affreightment: Abbott on Shipping, 146. At the time this vessel received her cargo at Calcutta, it is obvious that she was not fit to receive it; for without any marine accident, but lying in the harbor, she sprung a leak. In order to avoid the consequences of this misfortune, it is incumbent on the defendant to show that it was occasioned by perils of the sea;

which he cannot do, unless the gales which happened on her outward voyage were the cause; and even then it was the duty of the owner, or of his agent, the master, to have seen that she underwent a thorough and effectual repair. If she did not, however innocent the owner may be, he must abide the loss; for it is of the essence of his contract that his vessel shall be able to receive, retain and transport her cargo.

But upon looking into the survey had at Calcutta, it is at least questionable whether the leak was occasioned by a defect existing before the commencement of the voyage from Newburyport. The persons appointed to make the survey say, in their report, that they found a butt on the starboard side quite open; and that two inches of the seam appeared never to have been calked at all; which alone, they say, would have been sufficient to let in what water was in the hold. But whether the vessel was, or was not, seaworthy at the time of her sailing from Newburyport, it appears that when at Calcutta she was totally unfit to receive her cargo, and that, therefore, the defendant is not entitled to retain anything out of the plaintiff's adventure to indemnify him for the loss.

According to the agreement of the parties, the verdict must be amended so that the plaintiff recover the sum of three hundred dollars and one cent, with interest from the date of the writ.

The federal courts have cited this case as authority in *Reed v. United States*, 11 Wall. 273, on the point of the responsibility of the owner, in *Werk v. Leathers*, 1 Woods, 273; *Weston v. Minot*, 3 Wood. & M. 447, on the obligation to keep the vessel in repair.

GORE v. BRAZIER.

[3 Mass. 523.]

BREACH OF COVENANT OF WARRANTY—DAMAGES.—In an action upon a covenant of warranty, the measure of damages is the value of the land at the time of the eviction.

ACTION for the breach of the covenants in a deed. The declaration contained two counts; one for the breach of all the covenants, to-wit: of seisin, of right to convey against incumbrances, and of warranty; the other for the breach of the covenants of warranty and against incumbrances.

Gore and Jackson, for the plaintiff.

Deater and Sullivan, for the defendant.

The court first examined the facts to determine whether, under the statutes regarding the levy of an execution on the lands of deceased persons, there was such an ouster of the plaintiff as would give him a right to maintain the action; and the conclusion was that there was an eviction such as entitled him to maintain the action. The question was submitted as to the measure of damages; on this head the opinion was as follows:

PARSONS, C. J. The court have considered of the rule by which damages in this case are to be assessed. In a personal action of covenant broken, damages are demanded for the breach of a warranty by an ouster of the purchaser, by a right or title paramount. The plaintiff insists on the value of the lands at the time of the breach; and the defendant contends that the value when conveyed is the measure of the damages. By the ancient common law the remedy on a warranty was by voucher or *warrantia chartæ*, and the recompense recovered in those suits was other lands to the value at the time the warranty was made. This was the general rule; but when the warrantor, on being vouched, entered into the warranty generally, he was bound to render other lands to the value of the lands lost at the time he entered into the warranty: Vin. Abr. tit. Voucher, T. pl. 1, 2, 3; Id. tit. Warranty, K. pl. 11. In valuing the land lost, when the vouchee entered into the warranty specially, no regard was had to any improvements made by the tenant, as by erecting edifices or turning pasture into arable land; nor was the discovery of a mine in the land lost, after the warranty was made, but then not known, considered in ascertaining the value of the land to be recovered in recompense.

An effect originating in this feudal principle may be discovered in this state, in the assignment of dower against a purchaser. When a husband alienes with warranty during the coverture, and after dies, his widow shall not be entitled to the benefit of the improvements made by the purchaser, because he could not recover their value in other lands against the heir on the warranty of the husband. This rule is now supported in this state on principles of public policy, that purchasers may not be discouraged from improving their lands. If the lands have greatly risen in value, not from any improvements made upon them, nor from the discovery of any new sources of profit, but from extrinsic causes, as the increase of commerce or population, the lands to be recovered in recompense would be valued at the in-

creased price, so that the quantity might be proportionably reduced. This is here a question of mere curiosity, unless it should be considered as relating to the lands to be assigned to the widow for her dower. If the husband, during the coverture, had aliened a real estate in a commercial town, and at his death the rents had trebled from various causes unconnected with any improvements of the estate, and the widow should then sue for her dower, perhaps it would be difficult for the purchaser to maintain that one-ninth part only, and not one-third part, should be assigned to her.

This remedy to recover a recompense in other lands to the value, existed very anciently, when the principal consideration received on the alienation was the services to be performed by the tenant. The remedy might then be proper, as any improvements of the land thus paid for in services must redound wholly to the advantage of the tenant, as his services to the lord remained the same. But when lands were aliened for money when improvements in agriculture became an important object of public policy, and when the alienor might have no other lands to render a recompense in value, it became expedient that another remedy for the purchaser on eviction should be allowed. And it is certain that before the emigration of our ancestors, the tenant, on being lawfully ousted by a title paramount, might maintain a personal action of covenant broken on a real covenant of warranty: 1 Brownl. 21; 2 Id. 164, 165. This remedy was adopted by our ancestors as early as remedies for evictions of land sold with warranty were necessary. And in a personal action of covenant broken, it is a general rule of law that such pecuniary damages be recovered as shall be an adequate compensation for the injury sustained by the breach of the covenant. When this action was admitted to recover satisfaction for the breach of a real covenant of warranty, the same measure of damages was adopted as is used in other personal actions of covenant broken, which does not vary in principle from the rule on voucher, where the vouchee entered generally into the warranty. And the general practice has been to give a sum of money in damages equal to the value of the land at the time of the eviction, which was a breach of the covenant, and sometimes with interest on that sum, according to the circumstances of the case. In the first settlement of the country, the value of the land consisted chiefly in the improvements made by the tenants; and if on ouster the warranty would not secure to him the value of his improvements, he could derive little benefit from it. In

the case of *Leprillette v. Rand*, in Suffolk, it was ruled by the court that the plaintiff should recover the value at the time of the eviction, which greatly exceeded the value of the land when it was sold by the defendant. And in a case in Essex, the name of which is not recollected, the rule for assessing the damages was reserved by the parties, on a case stated for the consideration of the court, who determined that the law was settled that the plaintiff should recover, in money, the value at the time of the eviction. And in a late case, where Bosson, who held under the commonwealth, was evicted by Martin, the lands were appraised at their value at the time of the eviction, which value was paid to Bosson by order of the legislature.

The court are of opinion, conformably to the principles of law applied to personal actions of covenant broken, to the ancient usages of the state, and to the decisions of our predecessors, supported by the practice of the legislature, that the plaintiff in this action ought to recover in damages the value of the estate at the time of the eviction. And as the parties have agreed that the true value at that time was fifteen thousand dollars, the plaintiff must have judgment for that sum. As the plaintiff admits that immediately on the eviction he paid that sum to Boylston, and received back the estate, and has been ever since in receipt of the rents, he can have no claim for interest as a compensation for any immediate loss of profits.

In a note to *Horsford v. Wright*, 1 Am. Dec. 8, it was shown that this was the measure of damages on a breach of a covenant of warranty in Massachusetts, Maine, Connecticut, Vermont and Louisiana.

LARNED v. BUFFINTON.

[3 Mass. 546.]

EVIDENCE IN ACTION OF SLANDER.—In an action for slander, the plaintiff may give evidence of his own rank and condition in life, to aggravate the damages; and the defendant may also avail himself of such evidence when it legally tends to mitigate the damages.

SAME.—The defendant may give in evidence, under the general issue, facts tending to mitigate the damages, but this will be refused when he has pleaded the truth in justification.

SAME.—If, through the fault of the plaintiff, the defendant, at the time of speaking the words, and when he pleaded the justification, had cause for believing them true, he may show this in mitigation of damages.

ACTION on the case for malicious prosecution, and for slander.

The cause, the facts of which sufficiently appear from the opinion, came before this court on a motion for a new trial.

Ashman, for the defendant, in support of the motion.

Bliss, for the plaintiff.

By Court, PARSONS, C. J. This action is on the case for a malicious prosecution, and for defamatory words charging the plaintiff with stealing the defendant's horses. The defendant pleaded the truth of the words in justification, and issue was joined on a traverse of this plea; and a verdict found for the plaintiff.

The defendant moves for a new trial, because evidence proper to mitigate the damages was rejected by the judge, and because he misdirected the jury on the subject of damages; and on these two grounds exceptions are filed. The defendant failing in his justification, proposed to prove, in mitigation of the damages, the manner and condition of the plaintiff's life, and that previous to the cause of action his general character for honesty, integrity and fair dealing, was not good. Evidence of this nature was not admitted by the judge.

On the argument, it was observed by the court that a general statement of evidence proposed to be given, without producing witnesses to testify agreeably to the statement, was not regular; and the defendant was called upon to state the facts he was ready to prove. He accordingly stated by affidavit, that he at the trial had witnesses to prove "that the plaintiff left his father a few years since, before he was of age, and without any property; that since that time he had been a roving single man, without any fixed place of residence for any great length of time, and without having any regular business; having lived in Boston, Wilbraham, Springfield, Middleton, Worthington and Northampton; that he has in some of those places been considered as a drover, in others a butcher, and in a very circumscribed manner had followed those branches of business; but that the principal part of his time had been employed in buying, selling and exchanging horses in different parts of this and of the adjacent states; that he was without real estate; and that in the manner of gaining subsistence, and in his grade and standing with society, he was below mediocrity." After this statement, the court, in forming their opinion, have considered evidence of these facts regularly offered by the defendant, and as rejected by the judge.

As the defendant has not stated that any evidence was offered

touching the plaintiff's moral character, it is not necessary to give an opinion whether such an opinion would have been legal. But we are of opinion that the plaintiff may give in evidence, to aggravate the damages, his own rank and condition of life, and also that the defendant may avail himself of such evidence, when it will have a legal tendency to mitigate the damages, and that this may be done either on the general issue, or on a traverse of the justification, because the degree of injury the plaintiff may sustain by the defamation may very much depend on his rank and condition in society. It is a rule of law, that in the prosecution of any cause, neither party shall give evidence of any matters which are not in issue, because the other party will have no opportunity of encountering this evidence by opposing testimony. Consistently with this rule, the plaintiff's rank and condition in life may be given in evidence, because it is in issue, as the knowledge of it may be necessary to a just assessment of the damages, and because it is a fact, in its nature, of general notoriety. But the rule will not admit evidence of the particular facts in the defendant's statement, or the defendant must be considered as at all times prepared to give a history of his places of abode, and of his occupation during a greater part of his life, even in his minority, and to have with him his title to real estate, if he has any. Neither does the knowledge of the facts appear useful in the assessment of damages, unless, perhaps, to aggravate them by proving to the jury that the plaintiff was very generally known among his fellow-citizens, and that from this circumstance the injury from the slander would be more extensive.

We are now to consider whether the plaintiff's rank and condition in life, which the defendant offered in evidence, would have had, in this case, any legal tendency to mitigate the damages. The allegation that the plaintiff's manner of gaining subsistence, and that his station and condition in society was below mediocrity when connected with the other allegations in the defendant's statement, would, if proved, have satisfied the jury that the plaintiff gained his subsistence by buying, selling, and exchanging horses in this and the neighboring states; or, in other words, that he was a horse-jockey. Now, from the nature of this action, and from the evidence in the cause, it is not easy to presume that the jury had not evidence of these facts. It was the interest of the plaintiff that they should have this evidence, as its tendency in this case would have been rather to aggravate the damages. A man with the reputation

of a horse-stealer is ruined as a dealer in horses. With this character hanging on him, no man would trust him to try a horse, and no man would buy a horse of him, through fear he should buy a stolen one. We are, therefore, of this opinion, that this evidence, if given by the defendant, would have no legal tendency to mitigate the damages, and consequently he is not injured by its rejection.

The defendant has also excepted against the direction of the judge, because he charged the jury that, considering the circumstances which had been proved, the manner of speaking the words, and especially the justification by the defendant on record, no evidence whatever could be considered in mitigation of damages. We are satisfied that evidence of certain facts and circumstances may be received under the general issue, which ought to be rejected under this justification. In the former case, the defendant may prove that the words were spoken through heat or passion, and not from malice; or that they were spoken with an honest intention, through mistake, and not with a design to injure the plaintiff. But if the defendant, when called upon to answer in a court of law, will deliberately declare in his plea that the words are true, he precludes himself from any attempt to mitigate the damages by any of those facts or circumstances, because his plea of justification is inconsistent with them. But we are not prepared to declare that there are no facts or circumstances from which the jury may mitigate the damages under a special justification of the truth of the words, in which he shall fail. When, through the fault of the plaintiff, the defendant, as well at the time of speaking the words as when he pleaded his justification, had good cause to believe they were true, it appears reasonable that the jury should take into consideration this misconduct of the plaintiff to mitigate the damages. The direction of the judge excepted against is predicated not only on the plea of justification, but also on the circumstances which had been proved in the case. He has, therefore, at the request of the court, furnished us with a report of the evidence in the cause.

From this report it substantially appears that the plaintiff had several horses at the defendant's stable in Worthington, at livery; that all the horses were the property of the plaintiff, except a black horse, which was the joint property of the parties; that the plaintiff wanted the black horse to match another horse of his own, and that the defendant wanted him for the same purpose; that the plaintiff practiced finesse in re-

moving the horses from the defendant's stable; and in fact removed them, without the defendant's knowledge, to Mills's stable, distant about half a mile; that the next day the defendant knew they were at Mills's, and was there with the plaintiff attempting to adjust the controversy, and offered the plaintiff to arbitrate it, which he refused; that about two days after, the plaintiff took all his horses and went on with them to the eastward; that the defendant followed him, and might have arrested him at Northampton, but declined it, because he might attach more property when the plaintiff had gone further on; that the defendant arrested him at Belchertown, on a writ which he did not prosecute; that about the time of the arrest, and also after the plaintiff was in custody, he repeatedly uttered the defamatory words; that about the same time he told a witness that the horses were not his, except half the black horse, but that it was best to use policy.

From considering the report of the evidence, we are satisfied that the judge's direction, predicated on this evidence, was right. It does not appear that the defendant ever supposed that the defamatory words were true. He knew that all the horses were the plaintiff's, except the black horse, and of him that the plaintiff was part owner; this he declared, but said it was necessary to use policy. Indeed, the inference is, that he knew that the words were not true; for at Mills's he did not charge the plaintiff with the theft, but attempted to settle the dispute, and offered to arbitrate it. Afterwards, when he has had time for reconsideration, and to obtain the information of counsel as to the law as applied to the facts, he comes into court, and publicly puts the slander on record.

It is our opinion that a new trial be not granted, and that judgment be rendered according to the verdict, with the additional damages and costs, as consented to by the defendant in his agreement on file.

COFFIN v. COFFIN.

[4 MASS. 1.]

FREEDOM OF DEBATE IN LEGISLATIVE BODIES.—The freedom of deliberation, speech and debate assured by the constitution to each branch of the legislature, is particularly the privilege of the individual members rather than of the house as an organized body; and being derived from the will of the people, the members are entitled to this privilege, even against the will of the house.

SAME.—The constitutional provision securing such freedom should be construed liberally, so its full design may be answered; thus extending it to every act resulting from the nature of the member's office, and done in the execution of it, and exempting him from a liability for everything said or done by him as a representative, whether according to the rules of the house or not.

PRIVILEGED EXPRESSIONS.—A representative is not liable for defamation when the words charged were uttered in the execution of his official duty, and although spoken maliciously; nor if not uttered in the execution of his official duty, and not maliciously, nor with intent to defame.

NEW TRIAL WHEN DAMAGES EXCESSIVE.—When the damages found by the jury, in an action of tort, are so great that it may reasonably be presumed that in estimating them the jury did not exercise a sound discretion, but were influenced by passion, partiality, prejudice or corruption, the court may set aside the verdict and award a new trial.

ACTION of slander. The principal question in the cause was upon the construction of the constitutional provision declaring that the freedom of deliberation, speech and debate, in either house of the legislature, cannot be the foundation of any prosecution or action in any other court or place whatsoever. The case came before this court on a motion for a new trial, on the ground of misdirection of the judge, and of excessive damages, verdict having been found for the plaintiff for two thousand dollars.

The facts and the points raised by counsel are stated by the chief justice.

Dexter and Attorney-general Bidwell, for the defendant.

B. Whitman, for the plaintiff.

By Court, PARSONS, C. J. The plaintiff has commenced an action on the case, demanding damages of the defendant for an injury to his character committed by the defendant, in maliciously uttering and publishing defamatory words, which imported that the plaintiff had committed felony by robbing the Nantucket bank. To this demand, the defendant pleaded not guilty, and also, by leave of the court, a special plea in bar, justifying the speaking of the words, because, as he alleged at the time when they were spoken, he and Benjamin Russell were members of the house of representatives, then in session; and that he spoke the words to Russell in deliberation in the house concerning the appointment of a notary public, and that the words had relation to the subject of their deliberation. The plaintiff, in his replication, denies these allegations, and avers that the words were spoken by the defendant of his own wrong, and without such cause as he had alleged, and tenders an issue to

the country. The defendant does not demur to the replication, but joins the issue thus tendered.

Both the issues came on to trial, and it appeared from the evidence that when the words were spoken, the defendant and Russell were members of the house of representatives then in session. The occasion, manner and circumstances of speaking them are thus related by Russell, the witness: He having some acquaintance with the plaintiff, and thinking highly of his integrity, was applied to by him to move a resolution for the appointment of an additional notary for Nantucket, the town represented by the defendant. Russell made the motion, and had leave to lay the resolution on the table. The defendant in his place inquired where Russell had the information of the facts on which the resolution was moved. The witness answered, from a respectable gentleman from Nantucket. The resolution then passed, and the speaker took up some other business. Russell then left his place, and was standing in the passageway within the room conversing with several gentlemen. The defendant leaving his place, came over to Russell, and asked him who was the respectable gentleman from whom he had received the information he had communicated to the house. Russell answered carelessly, he was perhaps one of his relations, and named Coffin, as most of the Nantucket people were of that name. The witness then perceiving the plaintiff sitting behind the bar, pointed to him, and informed the defendant he was the man. The defendant looked towards him, and said: "What, that convict?" Russell, surprised at the question, asked the defendant what he meant, he replied: "Don't thee know the business of Nantucket bank?" Witness said "yes, but he was honorably acquitted." The defendant then said: "That did not make him less guilty, thee knows." It further appears that this conversation passed a little before one o'clock, that the election of notaries was not then before the house, but was made that afternoon, or the next day, and that the plaintiff was not a candidate for that office. And there is no evidence that the resolution laid on the table by Russell, and passed, or the subject-matter of it was ever called up in the house. It does not appear from the report that it was contended by the defendant; that the words testified to did not import the slander charged in the plaintiff's declaration, nor is the verdict objected to on that ground; the judge, therefore, directed the jury that if they believed the testimony, the plaintiff had maintained the first issue. But the defendant insisted

that the evidence supported the justification contained in the bar, and that, by law, the second issue ought to be found for him.

The question of law, therefore, arises on the second issue. Both parties had submitted the trial of this issue to a jury. The issue involved both law and fact, and the jury must decide the law and the fact. To enable them to settle the fact, they were to weigh the testimony; that they might truly decide the law, they were entitled to the assistance of the judge. If the judge had declined his aid in a matter of law, yet the jury must have formed their conclusion of law as correctly as they were able. But the judge was officially obliged to declare to the jury his opinion of the law. If this be denied, as a matter not within the jurisdiction of the court, it must also be denied that the jury were legally authorized to decide on the law; the consequence of which would be that when any defendant representative should plead his privilege in bar, whether the plea be true or false, cannot be inquired into, because every such plea must involve both law and fact; and the judge must send the parties out of court.

If the judge was officially obliged to declare the law to the jury, he must necessarily take notice of the law on which the defendant relied, and give it, according to his judgment, a sound construction, applicable to the issue on trial. The law relied on is the twenty-first article of the declaration of rights. This article he was obliged to notice and explain, according to what he judged to be its true intent and effect. If there had been any explanation of this article by the act of any legislature, or by the judgment of any court, constitutionally obligatory on courts of law, such explanation is law, and ought to have governed the judge in his construction of the article. It is not pretended that at the time of the trial, any such act or judgment existed. The only aid which the judge could receive must have been derived from other parts of the constitution, and from the principles of the common law, by which sound rules of construction are established. The judge accordingly gave to the jury his construction of the article, and declared to them his opinion that the facts did not in law maintain the issue for the defendant; and the jury found a verdict for the plaintiff.

To this opinion of the judge the defendant excepted, and moves for a new trial; and on the correctness of it are we now to decide. As the jury found a verdict agreeably to the judge's direction, it is to be presumed that they were influenced by it,

and if the direction was wrong, the cause ought to be again tried by another jury, uninfluenced by an erroneous opinion of the judge in a matter of law.

The twenty-first article of the declaration of rights declares that: "The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever." On this article the defendant relies for his justification. And if it were competent for the judge on the trial to declare his opinion of the true intent and meaning of it, it must be competent for this court to decide whether his opinion was or was not legal; or the defendant can have no relief by his motion, unless the court are to decide, without inquiry or authority, that the opinion was against law. But I know of no action within the jurisdiction of a court, and regularly before it, in which it will not be the duty of the judges to decide all matters of law arising in it, so far as the court is competent to decide on them, according to their own apprehension of the law. Otherwise they will have no jurisdiction of legal questions; or they must act as ministerial agents, deciding according to the will of others.

In considering this article, it appears to me that the privilege secured by it is not so much the privilege of the house as an organized body, as of each individual member composing it, who is entitled to this privilege even against the declared will of the house. For he does not hold this privilege at the pleasure of the house, but derives it from the will of the people, expressed in the constitution, which is paramount to the will of either or both branches of the legislature. In this respect, the privilege here secured resembles other privileges attached to each member by another part of the constitution, by which he is exempted from arrests on mesne (or original) process, during his going to, returning from or attending the general court. Of these privileges thus secured to each member, he cannot be deprived by a resolve of the house or by an act of the legislature. These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to de-

livering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office; and I would define the article as securing to every member exemption from prosecution for everything said or done by him as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house; and I am satisfied that there are cases in which he is entitled to this privilege when not within the walls of the representatives' chamber.

He cannot be exercising the functions of his office as member of a body unless the body be in existence. The house must be in session to enable him to claim that privilege; and it is in session, notwithstanding occasional adjournments for short intervals, for the convenience of its members. If a member, therefore, be out of the chamber, sitting in committee, executing the commission of the house, it appears to me that such member is within the reason of the article, and ought to be considered within the privilege. The body of which he is a member is in session, and he, as a member of that body, is in fact discharging the duties of his office. He ought, therefore, to be protected from civil or criminal prosecutions for everything said or done by him in the exercise of his functions as a representative, in committee, either in debating, in assenting to, or in draughting a report. Neither can I deny the member his privilege when executing the duties of his office in a convention of both houses, although the convention should be held in the senate chamber. To this construction of the article, it is objected that a private citizen may have his character basely defamed without any pecuniary recompense or satisfaction. The truth of the objection is admitted. But he may have other compensation awarded to him by the house, who have power, as a necessary incident, to demand of any of its members a retraction or apology, of or for anything he has said while discharging the duties of his office, either in the house, in committee, or in a convention of the two houses, on pain of expulsion. But if it is allowed that the remedy is inadequate, then a private benefit must submit to the public good. The injury to the reputation of a private citizen is of less importance to the commonwealth than the free and unreserved exercise of the duties of a representative, unawed by the fear of legal prosecutions.

A more extensive construction of the privileges of the members secured by this article I cannot give; because it cannot be supported by the language or the manifest intent of the article. When a representative is not acting as a member of the house, he is not entitled to any privileges above his fellow-citizens; nor are the rights of the people affected if he is placed on the same ground on which his constituents stand. He is secured the liberty of traveling to the house, of attending his duties there, of exercising the functions of his office as a member, and of returning home. But so careful were the people in providing that the privileges which they for their own benefit had secured to their representatives, should not unreasonably prejudice the rights of private citizens, that a member may be arrested upon execution in a civil suit, in cases where he could not be lawfully arrested on original or mesne process. And that offenses against law may be duly and seasonably punished, this privilege is not extended to arrests on criminal prosecutions, in any case where by law the member may be prosecuted as a criminal.

If this very liberal construction of the twenty-first article be just; if it be warranted by its language; if it be consonant to its manifest intent and design, the question before the court lies in a narrow compass. Was Coffin, the defendant, in speaking the defamatory words, executing the duties of his office? Or, in other language, was he acting as a representative? If he was, he is entitled to the privilege he claims; if he was not, but was acting as a private citizen, as a private citizen he must answer.

Upon information given by the plaintiff to Russell, a member, he had moved a resolution providing for the choice of another notary for Nantucket; and on Russell's stating that his information was from a respectable person from that place, the resolution had passed; the house had proceeded to other business; and the subject-matter of the resolution, or of the information, was not in fact before the house, although it is certain that any member might have moved to rescind the resolution. Russell, his brother member, was in the passage-way, conversing with several gentlemen, the defendant came to him, and inquired the name of Russell's informant, who, he had declared was a respectable gentleman from Nantucket. Was this inquiry, thus made, the act of a representative discharging his duty, or of a private citizen to gratify his curiosity? It was the former, says the defendant's counsel. Whether it was or was not, certainly it was innocent. But to pursue the evidence:

the defendant was answered, whatever was his motive, he had received the information. If upon it he intended again to call up the resolution, he might have done it. But no motion for that purpose was ever made. He then utters to Russell the defamatory words. What part of his legislative duty was he now performing? It is said that he might apprehend that the plaintiff was a candidate for the office of notary, and that his motive might be to dissuade Russell from giving him his vote. But there is no evidence that the defendant supposed the plaintiff to be a candidate, and it is in evidence that the plaintiff was not a candidate. It is also apparent that the defendant believed that Russell was not ignorant of the indictment against the plaintiff, and of his acquittal. I cannot, therefore, assign to the defendant any other motive for his indiscreet language, but to correct Russell for giving to the plaintiff the appellation of a respectable gentleman, and to justify the correction by asserting that an honorable acquittal, by the verdict of a jury, is not evidence of innocence. It is not, therefore, possible for me to presume that the defendant, in using thus publicly the defamatory words, even contemplated that he was in the discharge of any official duty. This inquiry by the defendant, and his replies, might have been made, for all the purposes intended by him, in State street, or in any other place, as well as in the representatives' chamber; and it is not easy for me to conceive that any language or conduct of a representative must be considered as official, merely because he chooses the representatives' chamber for the scene.

But it has been urged that the privilege must extend to a representative giving information to a brother member, on any subject before the house, or which may be expected to come before the house; for the information may be necessary to enable the member informed to discharge his official duty with ability and propriety. Without remarking the essential distinction between a man's seeking information on subjects relating to his office, and his actual execution of its functions, and without observing the extreme difficulty of supposing that defamatory words, maliciously uttered, can ever be considered as useful information, I do clearly admit that a representative will certainly be entitled to his privilege in all cases, where he shall give information in the discharge of his official duty, although the manner may be irregular and against the rules of the house. But when a representative pleads his privilege, to entitle himself to it, it must appear that some language or

conduct of his, in the character of a representative, is the foundation of the prosecution, for in no other character can he claim the privilege. But in actions for defamatory words against a member, he may, in cases to which his privilege does not extend, defend himself like any other citizen, by proving that the words were spoken for a justifiable purpose, not maliciously, nor with a design to defame the character of any man. And this defense will avail every man charged with slander, although it may be that the words uttered are not true. I do not, therefore, consider any citizen who is a representative, answerable in a prosecution for defamation, where the words charged were uttered in the execution of his official duty, although they were spoken maliciously with an intent to defame the character of any person. And I do consider a representative holden to answer for defamatory words spoken maliciously, and not in discharging the functions of his office. But to consider every malicious slander uttered by a citizen who is a representative, as within his privilege, because it was uttered in the walls of the representatives' chamber to another member, but not uttered in executing his official duty, would be to extend the privilege farther than was intended by the people, or than is consistent with sound policy, and would render the representatives' chamber a sanctuary for calumny, an effect which never has been, and, I confidently trust, never will be, endured by any house of representatives of Massachusetts.

It has been said that, although the judge at the trial had no other information of the nature and extent of the defendant's privileges but what he derived from the constitution; yet, that since the trial on the first of March instant, the house passed a resolution declaratory of the privileges of its members, to which declaration we are obliged to conform in our judgments; because the house is to judge exclusively of its own privileges. That the house is to judge exclusively of its privileges for certain intents and purposes, is very certain; but if it is to exclude courts of law from judging of the privileges of its members in every case, the consequences would be unfortunate to the members. If a member in any action pleads his privilege, he submits it to the judgment of the court; and if it be allowed, it is by virtue of the judgment of the court. All, therefore, which the court could do upon such an hypothesis, would be to reject the plea, lest, in judging of it, it should invade the privileges of the house.

The resolution declares that words spoken by any member

within the walls of the house, relative to any subject under their consideration, either in their separate capacity or in a convention of both branches of the legislature; whether the member speaking such words addresses himself in debate to the chair, or deliberates, or advises with another member respecting such subject—are alone and exclusively cognizable by the house; and that for any other tribunal to take cognizance of words thus spoken, would be a violation of the twenty-first article of the constitution. And the words relied on for the defendant are, “whether the member speaking such words addresses himself to the chair, or deliberate or advises with another member respecting such subject.” As it is admitted by the defendant’s counsel that this court is competent to construe the twenty-first article, in order to decide whether the facts in the case bring the defendant within it, so also it is admitted that the court is competent to construe this resolution for the same purpose. The resolution, judging from the face of it, does not appear to be an act of the house in any case of contempt on trial before it, but to be a general declaration of the privileges secured to the members by the twenty-first article of the constitution; because it is declared that an invasion of these privileges would be a violation of that article. I consider the house, therefore, as defining the constitutional privileges of its members, relating to words spoken to by them. In this declaration the words must be spoken on a subject before the house, and either addressed to the chair, or by one member to another by way of deliberation and advice on the same subject. In either case the words must be spoken officially, although in the latter case they may be spoken in a disorderly and irregular manner. The house has not, therefore, claimed any privileges for its members, when prosecuted for slander, unless the words charged were spoken officially in the character of a representative. This inference is inevitable, unless it should be unreasonably concluded that one member could deliberate or advise with another member, on a subject before the house, having abandoned his official duty, and acting as a private citizen. Whether I do or do not allow to the resolution thus passed the force of law, I am satisfied that it claims no privileges, but what are secured to the members by the constitution, of which, as far as it extends, it is in affirmance. The resolution does not therefore, in my opinion, aid the defendant; for it appears, from the facts in the case, that the defamatory words charged on the defendant were not spoken by him on a subject before

the house, either in an address to the chair, or by way of deliberation or advice with another member.

It has been urged that a declaration of privileges made by the house, whether those privileges do or do not belong to it, has the force of law, and is obligatory in all cases on the courts of justice. A declaration of that nature is not now before us; for I am satisfied that the house has all the privileges claimed by its resolution. Whenever a declaration shall be made by the house claiming privileges not belonging to it, in the opinion of the judges of a court of law, let the judges then decide the question. The merits of it must depend on a careful consideration of the constitution, with a due regard to the privileges and prerogatives of the house resulting from it. On this subject I give no opinion; but from the observations I have already made, it may not be improper to declare that if it had appeared to me that the words charged on the defendant had been officially spoken by him without the walls of the representatives' chamber, either in a convention of the two houses holden in the senate chamber, or in a committee, while executing the commission of the house then in session, as I am now advised, I would have allowed him his privilege, although by the resolution produced, the house seem to confine its privileges to words spoken within the walls of the representatives' chamber.

But the danger of conflicting jurisdictions has been insisted on with much ability and eloquence, if we should support the present action. I am sensible that where a conflict of final jurisdictions exists in any state, there must be a defect in the laws of that state. In my opinion, this state is not liable to the opprobrium; for I do not conceive that final conflicting jurisdictions here are consistent either with our constitution or statutes.

To introduce examples from the British house of commons cannot much illustrate the subject. The privileges of that house are not derived from any written constitution, but have been acquired by the successful struggles of centuries, directed either against the monarchy or an hereditary aristocracy. The exertions of the commons have generally been popular, because the people were supposed to reap the fruits of them. In this state, we have a written constitution, formed by the people, in which they have defined, not only the powers, but the privileges of the house, either by express words, or by necessary implication. A struggle for privileges in this state would be a contest against the people, to wrest from them what they have

not chosen to grant. And it may be added that the grant of privileges is a restraint on the rights of private citizens, which cannot be further restrained but by some constitutional law. These principles are perfectly consistent with the resolution of the house, which is not a claim of any further privileges not granted by the constitution, but a description of some, and only of some, privileges there granted.

I consider the house of representatives not only as an integral branch of the legislature, and as an essential part of the two houses in convention, but also as a court having final and exclusive cognizance of all matters within its jurisdiction, for the purposes for which it was vested with jurisdiction. It has jurisdiction of the election of its members; of the choice of its officers; of its rules of proceeding; and of all contempts against the house; either in its presence, or by violating the constitutional privileges of its members. When the house is proceeding as a court, it has exclusively authority to decide whether the matter before it be or be not within its jurisdiction, without the legal control of any other court. As to contempts, the house proceeds against the offender to punish the contempt. Courts of law proceed to punish offenses against the state, and to redress private wrongs. The same act may be a contempt against the house, an offense against the state, and an injury to an individual; and in all these respects proceedings may be had against the offender.

When the house decides in a question of election, it can conclusively decide on the right of voting claimed by any elector, so far as is necessary to settle the election. But an elector illegally deprived of his rights of voting, may demand redress for this wrong against the selectmen by a suit at law. This was decided in the cases of *Gardiner and Kilham v. Selectmen of Salem*, 2 Mass. 236, 244; where the only defense set up was, that the plaintiffs had no right to vote. Upon this question, the judgments of both courts, however rendered, could be executed without any interference. Let me illustrate the subject by supposing a case or two: A member is assaulted in the town in which the house is in session, and is cruelly beaten, for words spoken in the house in the execution of his duty. The house may proceed against the assailant for a contempt; and cannot the member prosecute him at law for damages? And may not the grand jury indict him for a breach of the peace? And neither can the proceedings of a court of law control the proceedings of the house; nor can the proceedings of the

house control the courts of law. The judgments of each court, whatever may be the result, can be executed without any interference. Suppose a public officer indicted for extortion, and upon trial acquitted at law; cannot he afterwards be convicted by the senate on an impeachment? Both judgments may be executed without interference. The courts of law proceed to punish the offender, and he is acquitted. The power of the senate is censorial, and exercised to preserve purity in office. If it should be supposed that the senate cannot proceed after an acquittal at law, it should be remembered that, by the express provision of the constitution, courts of law may proceed after a conviction in senate; and in the proceedings at law the jury may acquit; and it could not have been intended to place the senate as subordinate to a court of law. The true design of that provision was a mere cautionary declaration that the proceedings in the senate were not to punish offenders against the state, but for a different end. And I would add that, in the present case, if the house, of which the defendant was a member, had proceeded against the plaintiff for a contempt in suing this action—whatever had been the result of its proceedings, this court could not have interfered, or granted any relief until the sentence had been performed. And as this judgment could not have affected those proceedings, so neither could those proceedings have controlled the authority of this court. The two courts are independent, and have each exclusive cognizance of the matters within its jurisdiction; and although the transaction animadverted on may be the same, yet the proceedings are for different purposes, and the judgments of both courts may be executed without any interference. There cannot, therefore, be any conflict of jurisdictions. Extreme cases of the abuse of power, either in the house of representatives, or in this court, may be imagined; but they are not to be argued from, to influence legal decisions.

Since the argument of this cause, I have examined the subject with as much attention as I have been able to give to it, amidst all the business of the court pressing on us, with a strong disposition to guard the privileges of the house and of its members, because their privileges are essential to the rights of the people, and ought to be supported by every good citizen, according to their true limits. From this examination I am satisfied that, whatever may be our decision of the question, it is within our jurisdiction thus brought before us; and that no breach of the privileges of the house, or a conflict with its

jurisdiction, can result from our determination. I am convinced, after much consideration, that the facts presented by the case do not entitle the defendant to the privilege which he claims; and that, for this cause, the verdict ought not to be set aside. Under this impression, to give a different opinion would be a desertion of a solemn duty, and a gross prevarication with my own conscience.

SEDGWICK, SEWALL, THATCHER and PARKER, JJ., concurred.

On a motion for a new trial, on the ground that the jury had given excessive damages, the following opinion was given by Parsons, C. J.: The court having given their opinion that the verdict ought not to be set aside for the misdirection of the judge, the defendant now moves for a new trial, because the damages found by the jury are excessive. That a verdict may be set aside for excessive damages, there can be no doubt; and it may be done in two cases; one case is where the law recognizes some fixed rules and principles in measuring the damages, whence it may be known that there is an error in the verdict. In this case are included actions on contracts, or for torts done to property, the value of which may be ascertained by evidence. The other case includes actions for personal injuries, where no rules are prescribed by law for ascertaining the damages, but from the exorbitancy of them the court must conclude that the jury acted from passion, partiality, or corruption—causes which naturally produce error or injustice. But to enable the court to draw this conclusion, it is not enough that in their opinion the damages are too high, or that much less damages would have been a sufficient satisfaction to the plaintiff; for the law has not intrusted the court with a discretion to estimate the damages, but has devolved the power on a jury, as a matter of sentiment and feeling, to be exercised by them according to their sound discretion, duly weighing all the circumstances of the case, and considering the state, degree, quality, trade or profession, as well of the party injured as of him who did the injury. Judges, therefore, should be very cautious how they overthrow verdicts, given by twelve men on their oaths, on the ground of excessive damages.

But as excessive damages may be a good cause for setting aside a verdict in an action for a personal injury, it may be proper to consider when damages are, for this purpose, to be adjudged by the court to be excessive. In *Wilford v. Berkley*, 1 Burr. 609, the principle stated is, that the magnitude of the

damages must be such that the court can manifestly see that the jury have been outrageous in giving such damages as greatly exceeded the injury. A verdict must be set aside for excessive damages, if they are such as are unreasonable and outrageous, and which all mankind might at first blush see to be unreasonable: *Leeman v. Allen*, 2 Wils. 160. And it must be a glaring case, indeed, of outrageous damages in a tort, and which all mankind at first blush must think so, to induce the court to grant a new trial for excessive damages: *Huckle v. Money*, 2 Wils. 205. In the case of *Boardman v. Carrington et al.*, 2 Wils. 244, it is observed by the court, that there is great difference between cases where damages may be seen, as in promises or trespass for goods, and where the damages are matters of opinion and speculation, and are ideal, that the judges are to advise, and not to control juries; and when a verdict is set aside for excessive damages, it must be in a case where the damages are monstrous and enormous indeed, and such as all mankind will be ready to exclaim against at first blush. It is admitted in the case of *Gilbert v. Burtenshaw*, Cowper, 280, which was cited at the bar, that verdicts may be set aside for excessive damages, when their magnitude manifestly shows the jury to have been actuated by passion, partiality or prejudice. But it is observed that it is by no means to be done because the court may feel, that if they had been on the jury, they would have given less damages, or because they may think that the jury would have discharged their duty by giving a less sum; and that of all the cases delivered to a jury, none is more emphatically left to their sound discretion than an action of slander; and unless it appears that the damages are flagrantly outrageous and extravagant, it is difficult for the court to draw a line.

The result of these cases seems clearly to settle the principles which are to govern the court in setting aside a verdict for excessive damages in an action for a personal injury. When the damages are so great that it may reasonably be presumed that the jury, in assessing them, did not exercise a sound discretion, but were influenced by passion, partiality, prejudice or corruption, the court may set aside the verdict, and send the cause to another jury for revision.

Let us now consider the evidence, so far as it can be collected from the record and the judge's report:

The words uttered imported a charge of a heinous crime, a felonious robbery of the Nantucket Bank. They were not spoken privately, but in the chamber of the house of representa-

tives, and in the hearing of some people there, for Russell was interrupted by the defendant when conversing with several gentlemen. The defendant was in a respectable and honorable station, representing in the legislature the town of Nantucket. And there is no evidence of the condition, circumstances or profession of the plaintiff.

The defendant's counsel have argued that the damages are excessive on three grounds: That it appears from the record that the jury, at the common pleas in Nantucket, assessed the damages at fifteen dollars only; that the defendant did not wantonly seek occasion for uttering the slander, but that it was offered by the language the witness had used on a subject recently under consideration of the house; and that it appears that the plaintiff, having been acquitted of the crime imputed to him, was not in danger of being prosecuted criminally in consequence of the defamation.

The first argument cannot have any weight, because we have no knowledge of the evidence offered to the former jury, and can, therefore, form no opinion of the impression which the injury the plaintiff complained of, ought to have made on their minds. And if we could presume that they had the same evidence that was given to the last jury, yet it is an established rule of law that the jury on the appeal are obliged to try the cause uninfluenced by any former verdict.

The circumstance relied on in the second argument does not appear to us to have much, if any, tendency to mitigate the damages. Russell had declared that his information was from a respectable gentleman, an epithet, when applied to the plaintiff, the defendant did not brook, but retorted the charge of felony.

The last circumstance relied on by the defendant's counsel certainly had a tendency, in one view of the subject, to mitigate the damages, for the reason assigned in the argument. But upon a consideration of all the circumstances, it is our opinion that its tendency was, upon the whole, to aggravate the damages. The plaintiff, having been accused of felony, had submitted his cause to his country, and a jury had acquitted him. This was all he could do in his own justification. If he is not now to be considered as an innocent man, he has no other remedy, no other hope. This public declaration of his innocence before a competent and impartial tribunal, he has a right to consider not only as a defense against punishment, but as a shield against calumny. But the defendant, as far as in him

lay, would disarm him of his defense, and expose him, helpless and unprotected, to obloquy and disgrace. He cannot have another trial for the offense; and when he seeks, in a civil action, a compensation for the injury, he ought to receive a liberal and exemplary satisfaction.

There is no objection to the direction of the judge to the jury on the subject of damages; and there is no evidence that they had been tampered with, or were connected with either party, or were influenced by any bias or prejudice to either side. The cause was left to them, under all the circumstances either party thought fit to lay before them; and they found a verdict for the plaintiff, assessing his damages at twenty-five hundred dollars.

Before we can set aside this verdict, on account of these damages, we must infer from their magnitude, under all the circumstances of this case, that the jury acted intemperately, or were influenced by passion, prejudice, or partiality. To make this inference, we must have satisfactory evidence that the damages are excessive: 2 Wils. 248, and in our opinion, this evidence is not before us. The verdict, therefore, cannot be set aside.

Were we impressed with a belief that the damages were too great, and that a less sum would have been an adequate compensation to the plaintiff, yet whether our impression or the impression of the jury is the most correct, as judges, we are not authorized to determine. The plaintiff's counsel has intimated that he did not wish for larger damages than the court should think reasonable, as the object of his client in the prosecution was to obtain justice for his character, and not to dispose of it for money. It is not the province of the court to advise either party; but as the jury have done ample justice to plaintiff's character, we are satisfied that a liberal remission of a part of the damages could not in any manner operate to the plaintiff's dishonor.

Unless there be a remission of part of the damages, judgment must be entered according to the verdict.

PUTNAM v. SULLIVAN.

[4 Mass. 45.]

DEMAND OF PAYMENT WHEN EXCUSED.—In an action by an indorsee against an indorser of a promissory note, the plaintiff is not bound to prove a demand on the promisor, where it appears that the latter had absconded before the maturity of the note.

FRAUDULENT ISSUE OF NEGOTIABLE PAPER.—Where a merchant had intrusted blank indorsements to his clerk, and one by false pretenses obtained and used them, such fraudulent use is not a forgery, nor such a fraud as will discharge the indorser, as against an innocent indorsee.

ACTION on the case by the indorsees against the indorsers of a promissory note, dated December 1, 1804, payable to the defendants or their order ninety days from date, with grace. A verdict had been given for the plaintiff, subject to the opinion of this court upon the judge's report, containing the following facts: The plaintiffs were innocent indorsees for a valuable consideration, and received the note indorsed in blank; the handwriting of the promisor and indorsers was admitted; the note being deposited with the Boston Bank for collection, notice was left at the lodgings of the promisor by the messenger of the bank on the twenty-eighth February, 1805, and on the third March, following, W. B. Sullivan, a member of the firm of Jno. L. Sullivan & Co., the defendants, was notified that the note had not been paid; before the note fell due, the promisor absconded, a fact known to all the parties at the time. It appeared further, that during the absence of one of the defendants in Europe, the other, about December 1, 1804, having occasion to go to Philadelphia, intrusted to a clerk a number of papers, on which one of the house had written the name of the firm in blank, some to be used as notes indorsed by the house, others as notes in which the house were to be promisors. These papers were to be resorted to when money was needed as advances on sales by the house on commission, or for the renewal of the notes of the firm due at the banks; and one of these blanks the clerk was directed to deliver to the promisor upon the note sued in this action, in order to renew a note signed by him, then in the bank, which note the firm had indorsed. By deception and contrivance the promisor obtained from the clerk four blank indorsements of the firm, one of which was used to renew the note at the bank; and another had been used to make the note sued on in this action

Pextler and Sullivan, for the defendants, contended that there was no demand of payment when the note was due; that the note originated in fraud, and was never made for the benefit of the promisor, and would not support an action: *Mead v. Young*, 4 T. R. 28; *Master et al. v. Miller*, Id. 320; that the note was an actual forgery, which is the fraudulent making or alteration of a writing, with intent to prejudice another man's right, and is the counterfeiting a man's hand so as to give the appearance of truth to a deceit and falsity: 2 Bac. Ab. Forgery, A; 3 Inst. 171.

Solicitor-general Davis and C. Davis, for the plaintiff, urged that the presentment to the promisor for payment was unnecessary, he having absconded before the note fell due; that the defendants could not impeach the note in the hands of an innocent indorsee; that the note would have been good in the hands of an innocent indorsee for value, even had the promisor stolen it: *Miller v. Race*, 1 Burr. 452; that it was through the defendant's negligence that the promisor had been enabled to commit the fraud, and they must suffer: *Lickbarrow v. Mason*, 2 T. R. 70. Moreover, the note is indorsed in blank, is transferable by delivery only, the possession carrying with it the property: 1 Salk. 126; 2 Show. 235; 3 Burr. 1516; and where the holder received the note for a valuable consideration, *bona fide*, he may recover against the drawer, acceptor or indorser in blank: Kyd. 102; *Peacock v. Rhodes et al.*, Doug. 632; *Miller v. Race*; *Russell v. Langstaffe*, Doug. 514.

By Court, PARSONS, C. J. The first objection made by the defendants is founded on a want of a demand of payment on the promisor when the note was payable. As to this objection, the facts are, that on the first day of grace, which was the last day of February, notice was left at the lodgings of the promisor, that the note would be due on the last day of grace, with a request to pay it then; but it also appears that before that time it was known to the parties that he had absconded, and, when the note was payable, he was not to be found. The condition on which an indorser of a note is holden is, that the indorsee shall present the note to the promisor when due, and demand payment of it, if it can be done by using due diligence. Now, it appears that when the note in this case was due, it could not be presented to the promisor for payment, and that there was no neglect in the indorsers. We are all, therefore, satisfied that the indorsers are holden on their indorsement in this case, notwithstanding there was no demand on the promisor.

The second objection is, that the defendants did not, in construction of law, indorse this note. On the facts in this case we are to decide who shall suffer the loss of the money; the plaintiffs, who, it is agreed, are innocent indorsers, or the defendants. It is objected that this note ought to be considered as a forgery of the names of the indorsers; because a note was afterwards written on the face of the paper by the promisor, not only without the direction or consent of the defendants, but against their express instruction; and therefore that it was a false and fraudulent alteration of a writing, to the prejudice of the indorsers.

This objection would have great weight if, when the indorsers put the name of the firm on the paper, they had not intended that something should afterwards be written, to which the name should apply as an indorsement; for then the paper would have been delivered over unaccompanied by any trust or confidence. If the clerk had fraudulently, and for his own benefit, made use of all the indorsements for making promissory notes to charge the indorsers, we are of opinion that this use, though a gross fraud, would not be in law a forgery, but a breach of trust. And for the same reason, when one of these indorsements was delivered by the clerk, who had the custody of them, to the promisor, who by false pretenses had obtained it, the fraudulent use of it would not be a forgery, because it was delivered with the intention that a note should be written on the face of the paper by the promisor, for the purpose of negotiating it as indorsed in blank by the house. And we must consider a delivery by the clerk, who was intrusted with a power of using these indorsements (although his discretion was confined), as a delivery by one of the house, whether he was deceived, as in the present case, or had voluntarily exceeded his direction. For the limitation imposed on his discretion was not known to any but to himself, and to his principals.

It is further objected that if the writing of this note under these circumstances is not a forgery, yet it is such a fraud as will discharge the indorsers against an innocent indorsee. The counsel for the defendants agree that generally an indorsement obtained by fraud shall hold the indorsers according to the terms of it; but they make a distinction between the cases where the indorser, through fraudulent pretenses, has been induced to indorse the note he is called on to pay, and where he never intended to indorse a note of that description, but a different note, and for a different purpose.

Perhaps there may be cases in which this distinction ought to prevail, as if a blind man had a note falsely and fraudulently read to him, and he indorsed it, supposing it to be the note read to him. But we are satisfied that an indorser cannot avail himself of this distinction, but in cases where he is not chargeable with any laches or neglect, or misplaced confidence in others. Here, one of two innocent parties must suffer. The indorsees confided in the signature of the defendants, and they could have no reason to suppose that it had been improperly obtained. The note was openly offered to the plaintiffs by a broker, and when they objected on account of the absence of both the indorsers, they were answered, on the information of the promisor, whose character then stood fair, that blank indorsements had been left with the clerk, and that the indorsers had before indorsed a number of notes for the same person, which had been negotiated by a broker. On the other hand, the loss has been occasioned by the misplaced confidence of the indorsers in a clerk too young or too inexperienced to guard against the arts of the promisor. It is to be regretted that the blank indorsements had not been deposited with the brother of the partners, who was directed to be consulted as to the use of them; for then no innocent person would have been a sufferer.

From a view of all the facts, as they are presented to us, it is our opinion that the indorsers must be holden, and that judgment must be entered according to the verdict, with the additional interest agreed.

In forming this opinion, we have been necessarily led to consider the effect of a different opinion on the commercial part of the community. How far it is common for merchants to intrust their clerks with blank signatures or indorsements, is not known. But when merchants are in the habit of indorsing for each other at the banks, it is very common to put their names on blank paper, and deliver them to the party to be accommodated, for the express purpose of obtaining a renewal of certain notes, when they become due. And if the party having these signatures should employ them as names to other negotiable securities not contemplated, and the signatures should for that reason be void, much injury might result to innocent indorsers, or the bank discounts would be greatly embarrassed.

This case is particularly noticed by writers on negotiable instruments on the point as regards the liability of one who intrusts an agent with blank indorsements. Thus Parsons, on Notes and Bills, notices it extensively, and points it out as an important and leading case on this head; and

Daniel, on Negotiable Instruments, cites it frequently on the same point. It is cited on this point and its authority recognized in *Mussey v. Beecher*, 3 Cush. 519; *Riley v. Gerrish*, 9 Id. 107; *Androscoggin Bank v. Kimball*, 10 Id. 374; *Belknap v. National Bank of North America*, 100 Mass. 381; *Roe v. Jerome*, 18 Conn. 157; *Chemung Canal Bank v. Bradner*, 44 N. Y. 686; *Chapman v. Rose*, 56 Id. 143.

On the point as to a necessity for a demand, it is noticed in *Taster v. Bartlett*, 5 Cush. 363; *Pierce v. Cate*, 12 Id. 192; *Rhett v. Poe*, 2 How. 482; *Foster v. Julien*, 24 N. Y. 37.

WALLIS v. WALLIS.

[4 Mass. 126.]

CONSIDERATION FOR DEED—ACTION TO RECOVER BACK.—A grantor by bargain and sale, for a valuable consideration, sold land with warranty, the grantee to hold from the grantor's death. It was held that during the grantor's life no action would lie to recover back the consideration; although an action on the covenant would, after death of the grantor, if a title to the land were not made to the grantee or his heirs.

COVENANT TO STAND SEISED.—If such bargain and sale be made by a father to his son, a consideration of natural affection from the relation of the parties will be presumed in addition to the valuable consideration expressed in the deed; and it will be construed as a covenant of the grantor to stand seised to his own use during life, and after his death to the use of the grantee.

ASSUMPSIT. The action was originally brought by plaintiff's testator, and on his decease prosecuted by plaintiff. The case was submitted to this court upon the following statement of facts: On the eleventh of June, 1805, defendant by his deed conveyed to the plaintiff's testator, defendant's son, his heirs and assigns, a certain tract of land, to have and to hold after the death of the grantor, the consideration of four hundred dollars being expressed in the deed. The grantor entered into covenants of seisin and against incumbrances, except his, the grantor's, right to the use and improvement of the land during his life, and also of warranty. The defendant refused to permit the testator to enter under the said deed; and this action was brought to recover the four hundred dollars consideration money, on the ground that nothing passed by the deed.

Hastings and Bigelow, for the plaintiff.

Dana, for the defendant.

By Court, PARSONS, C. J. We do not know any legal principles on which this action can be supported. The money was not paid through mistake, being supposed to be due when it was not; it was not obtained by deceit, fraud, imposition or

oppression; nor was it paid upon an executory contract, which has happened to fail, or which has been or might be lawfully disaffirmed by either party. The most that can be urged for the plaintiff is, that nothing passed by the deed, as it was intended to convey a freehold *in futuro*; but he voluntarily paid the money for such a conveyance, and took a covenant from the grantor that, after his death, the grantee and his heirs should have the land; which covenant, at the grantor's death, may be broken, and the foundation of an action for damages, if a title to the land be not made to the grantee or his heirs.

But fortunately for the grantee, he is mistaken in the construction of his deed. For, although it is true that by a common law conveyance a freehold cannot be conveyed *in futuro*, yet by a covenant to stand seised to uses, such conveyance can be effected. And every deed ought to be construed, if it be legally possible, so as to effect the intent of the parties. In this case, beside the valuable consideration expressed, a consideration of natural affection may be averred as consistent with it, for the consanguinity of the parties, though not mentioned in the deed, is agreed in the case. The intent of the parties is clear, and there is a covenant of the grantor, that after his death the grantee shall have the land. This conveyance is therefore to be considered, in law, as a covenant by the grantor to stand seised of the land, to his own use during his life, and after his decease to the use of the grantee and his heirs. And upon the execution of the deed the grantor was tenant for life, and a remainder in fee was vested in the grantee.

The plaintiff must be called.

The principle laid down in this case, that, in addition to the pecuniary consideration expressed in the deed, a consideration of consanguinity may be shown, to support the conveyance as a covenant to stand seised, has been recognized, and this case cited with approval in *Parker v. Nichols*, 7 Pick. 115; *Gale v. Coburn*, 18 Id. 401; *Brewer v. Hardy*, 22 Id. 380; *Clark v. Deshon*, 12 Cush. 591; *Barrett v. French*, 1 Conn. 364; *Wardwell v. Bassett*, 8 R. I. 305; *Jackson v. Staats*, 11 Johns. 351. In *Brewer v. Hardy*, decided in 1839, the court say: "The case of *Wallis v. Wallis* has stood not only unimpeached for thirty years, but is recognized as sound law. It is part of the established legal conveyancing of the commonwealth, and not now to be shaken by this court." The principal case is also cited and explained in *Wyman v. Brown*, 50 Me. 154. On the point as to the recovery of the consideration paid, Parker, C. J., delivering the opinion of the court in *Watkins v. Otis*, 2 Pick. 97, citing this case, says: "The consideration paid for the purchase of land which is conveyed by deed cannot be recovered back in an action for money had and received, although the title fail in the

hands of the purchaser, and this because there are either covenants upon which the party may have a remedy; or if there be not, the absence of them is evidence that the purchaser took the title at his own risk."

COMMONWEALTH v. CLAP.

[4 MASS. 163.]

JUSTIFICATION OF LIBEL.—In a criminal prosecution for a libel the truth is no justification; but the defendant may show the purpose of the publication to have been justifiable, and then give the truth in evidence to negative the malice and intent to defame.

PUBLICATION RESPECTING PUBLIC OFFICERS.—Publications of the truth regarding the character of a public elective officer, and referring to his qualifications for such office, made with intent to inform the people, are not libelous.

SAME, WHEN LIBELOUS.—Because of the important public interests involved in the election of public officers, the publication of falsehood and calumny against public officers and candidates for public office, is a very high offense.

INDICTMENT for libel. Clap had posted in several public places the following: "Caleb Haywood is a liar, a scoundrel, a cheat, and a swindler. Don't pull this down."

On the trial, defendant's counsel offered evidence of the truth of the matters charged as libelous, which evidence was rejected. Upon the return of a verdict of guilty, defendant moved for a new trial on the ground of the rejection of the evidence offered.

Otis and Selfridge, for the defendant, contended that at common law the charge must be both false in itself, and maliciously published: 3 Inst. 174; 2 Id. 226, 227; 5 Rep. 125; 9 Id. 59; *The Seven Bishops' case*, 4 State Trials, 394; *Lake v. Hatton*, Hob. 252, *The King v. Haswell*, 4 Moore, 627; that Hayward, being an auctioneer, an officer publicly appointed, his character is of interest to the citizens at large, who have a right to speak and publish the truth respecting him.

Attorney-general Bidwell and solicitor-general Davis, contra, urged that it was not the falsity, but the provocation, that was to be punished criminally: 4 Bl. Com. 150; 1 Hawk. P. C., c. 73, sec. 6; 5 Rep. 125; Hobart, 253; Moore, 627; Strange, 498; 11 Mod. 99; *Franklin's trial*, 3 State Trials, 275. An information for libel need not allege the libel to be false: *Rex v. Burks*, 7 T. R. 4. The libelous words were not applied to Hayward in his official character, but relate to the private dealings and character of him as an individual.

By Court, PARSONS, C. J. The defendant has been convicted by the verdict of a jury of publishing a libel. On the trial, he moved to give in evidence, in his defense, that the contents of the publication were true. This evidence the judge rejected, and for that reason the defendant moves for a new trial.

It is necessary to consider what publication is libelous, and the reason why a libelous publication is an offense against the commonwealth.

A libel is a malicious publication, expressed either in printing or writing, or by signs and pictures, tending either to blacken the memory of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule. The cause why libelous publications are offenses against the state, is their direct tendency to a breach of the public peace, by provoking the parties injured, and their friends and families, to acts of revenge, which it would not be easy to restrain, were offenses of this kind not severely punished. And every day's experience will justify the law in attributing to libels that tendency which renders the publication of them an offense against the state. The essence of the offense consists in the malice of the publication, or the intent to defame the reputation of another. In the definition of a libel, as an offense against law, it is not considered whether the publication be true or false; because a man may maliciously publish the truth against another, with the intent to defame his character, and if the publication be true, the tendency of it to inflame the passions, and to excite revenge, is not diminished, but may sometimes be strengthened. The inference is, therefore, very clear, that the defendant cannot justify himself for publishing a libel, merely by proving the truth of the publication, and that the direction of the judge was right.

If the law admitted the truth of the words in this case to be a justification, the effect would be a greater injury to the party libeled. He is not a party to the prosecution, nor is he put on his defense; and the evidence at the trial might more cruelly defame his character than the original libel. Although the truth of the words is no justification in a criminal prosecution for a libel, yet the defendant may repel the charge, by proving that the publication was for a justifiable purpose, and not malicious, nor with the intent to defame any man. And there may be cases where the defendant, having proved the purpose justifiable, may give in evidence the truth of the words, when such evidence will tend to negative the malice and intent to defame.

Upon this principle, a man may apply by complaint to the legislature to remove an unworthy officer; and if the complaint be true, and made with the honest intention of giving useful information, and not maliciously, or with intent to defame, the complaint will not be a libel. And when any man shall consent to be a candidate for a public office conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for the office. And publications of the truth on this subject, with the honest intention of informing the people, are not a libel. For it would be unreasonable to conclude that the publication of truths, which it is the interest of the people to know, should be an offense against their laws. And every man holding a public elective office may be considered as within this principle; for as a re-election is the only way his constituents can manifest their approbation of his conduct, it is to be presumed that he is consenting to a re-election if he does not disclaim it. For every good man would wish the approbation of his constituents for meritorious conduct.

For the same reason, the publication of falsehood and calumny against public officers, or candidates for public offices, is an offense most dangerous to the people, and deserves punishment; because the people may be deceived, and reject the best citizens, to their great injury, and it may be to the loss of their liberties. But the publication of a libel maliciously, and with intent to defame, whether it be true or not, is clearly an offense against law, on sound principles, which must be adhered to so long as the restraint of all tendencies to the breach of the public peace, and to private animosity and revenge, is salutary to the commonwealth.

Motion denied.

On account of the precise and clear definition of libel given by Chief Justice Parsons, in this case, it has been frequently cited with approbation. Thus, in *Clark v. Binney*, 2 Pick. 115, Lincoln, J., says: "To the correctness of this definition no objection can now be urged. It rests upon the authority of an unbroken series of decisions for ages, and its application to the condition of civilized society, and to individuals in social life, has the sanction of reason and the approval of every reflecting and intelligent mind."

It is cited in *Commonwealth v. Snelling*, 15 Pick. 214, as to the admissibility of the truth in evidence in a criminal prosecution for libel. And in *White v. Nicholls*, 3 How. 290, as to malice being the essence of libel.

CLAP v. DRAPER.

[4 MASS. 266.]

GRANT OF INHERITANCE IN TREES.—A grant to one, his heirs and assigns, of all the trees and timber standing and growing on certain lands forever, with liberty to cut and carry them away, conveys an estate of inheritance in the trees and timber, and the grantee can maintain trespass *quare clausum fregit* against the owner of the soil for cutting down the trees.

CONSTRUCTION OF CONTEMPORANEOUS INSTRUMENTS.—Where two instruments are executed at the same time, one referring to the other, and relating to the same transaction, they must be considered as intended to effect the same contract, and must be construed together.

TRESPASS for breaking and entering the plaintiff's close, and cutting and carrying away five hundred trees of the value of five hundred dollars. Upon not guilty pleaded, a special verdict was found containing the following facts: Joseph Humfrey was seised of the close in fee, and conveyed the same by deed, dated eighteenth May, 1763, to Stephen Fowler, in fee; on the same day, Fowler reconveyed to Humfrey, his heirs and assigns, all the trees and timbers standing and growing on said land forever, with free liberty for them to cut and carry away said trees and timber, at all times, at their pleasure, forever; the deed to Fowler expressed no consideration. The plaintiff holds all the right which was conveyed by Fowler to Humfrey, and the defendant holds all the estate that was Fowler's; the defendant cut and carried away the trees mentioned in the declaration, some of which were standing on the eighteenth May, 1763; and the plaintiff and those claiming under him have, from that date to the present time, taken and carried away the trees at their pleasure. During all this time, the defendant, and those claiming under him, have had the herbage.

L. Richardson, for the plaintiff, contended that he had an estate of inheritance in the timber and trees, and was entitled to this form of action: *Lifford's case*, 11 Co. 49; *Sir Francis Barrington's case*, 11 Co. 271; *Ives's case*, 5 Co. 11; 3 Dyer, 285; 2 Brownl. 289, 322, 328; Bracton, 222; Co. Litt. 4; Rolle's Rep. 96, 99, 137.

J. Richardson, for the defendant, contended that the grant of the trees amounted only to a license: *Spyve v. Topham*, 3 East, 115; that the grant was confined to trees then growing, not to such as should spring up afterwards: *Whistler v. Paslow*, Cro. Jac. 487; *Pincomb v. Thomas*, Id. 524; that the plaintiff could

not maintain trespass *quare clausum fregit*, he not being the owner of the soil.

By Court, PARSONS, C. J. [after stating the facts of the case]. The two deeds in this case, executed on the same day, the latter referring to the former, and relating to the same transaction, must be considered as intended to effect the same contract, and must be construed together. The result of this joint construction is, that the grantor conveyed the close to the grantee in fee, reserving to himself an inheritance in the trees and timber, not only then growing, but which might thereafter be growing in the close. This is the natural effect of the grantee's agreement that the grantor and his heirs should have all the trees and timber standing and growing on the close forever, and not merely those then standing, or which should be standing within a limited time; and of a perpetual license to cut and carry them away. The plaintiff having all the estate in the trees, timber and close, which the grantor had after the execution of these two deeds, he has an inheritance in the trees and timber, with an exclusive interest in the soil so far only as it may be necessary for the support and nourishment of the trees: 8 Co. 271; Cro. Jac. 487; 2 Roll. Abr. 455; 11 Co. 46. For cutting down and carrying away the trees, trespass undoubtedly lies: *Hitchcock v. Harvey*, 2 Leon. 213.

But the defendant insisted that the plaintiff could not maintain trespass for breaking the close. Upon looking into the cases, we are satisfied that the plaintiff, having an inheritance in the trees, and an exclusive right in the soil of the close, as far as was necessary for their support and nourishment, may maintain trespass for breaking the close, as well as for cutting. It appears to be a principle of law well settled, that where a man has a separate interest in the soil for a particular use, although the right of the soil is not in him, if he be injured in the enjoyment of his particular use of the soil, he may maintain trespass *quare clausum fregit*; but not if his interest is in common with others. Thus this action lies for him who has the herbage, although not a right to the soil: *Hoe v. Taylor*, Moor. 355; Co. Lit. 4 b; Dalison, 47; Moor. 302; Cro. Eliz. 421. But if he is entitled to a portion of the herbage for a particular part of the year, he cannot maintain this action, but may maintain an action of trespass for spoiling his grass: 2 Leon. 213; *vide*, also, *Devoclas et al. v. Kendall et al.*, Yelv. 187.

The latest case on this subject is the case of *Wilson v. Mackreth*, 8 Burr. 1824. The plaintiff had an exclusive right to

take the turf in a several parcel of ground, in which, and in other parcels adjoining, he and the other tenants of the manor had common of pasture, the right of the soil being in the lord of the manor. The defendant dug and carried peats in the place in question, and it was held that the plaintiff might maintain trespass *quare clausum fregit* against him. And the difference there taken is between exclusive rights and rights in common; that if the plaintiff had only a common of turbary, trespass would not lie.

Upon the authority of this case, as well as the reasonableness of the principle, the plaintiff, in consequence of his inheritance in the trees, had such an interest in, although not the right of soil, that he may maintain trespass *quare clausum fregit* in this case, and must have judgment on the special verdict.

As showing that an estate of inheritance may exist in trees or land, while the fee of the soil is in another, this case is cited in *Reed v. Merfield*, 10 Met. 159, and on the same point in *Delaney v. Root*, 99 Mass. 548; *White v. Foster*, 102 Id. 378.

In reference to the construction of contemporaneous instruments, it is cited in *Cloyes v. Sweetser*, 4 Cush. 405; *Porter v. Sullivan*, 7 Gray, 448; and *Wildman v. Taylor*, 4 Ben. 48.

STETSON v. MASSACHUSETTS MUTUAL FIRE INSURANCE COMPANY.

[4 Mass. 330.]

ALIENATION OF PROPERTY INSURED.—A conveyance of an undivided half of the property insured, with a reservation of a term of seven years therein, and a reconveyance in mortgage of such half, is not such an alienation as will prevent a recovery for a loss occurring within the seven years, although the insured had also leased the premises for the same period.

ALTERATION OF BUILDING.—An insured represented, at the time of application for insurance, that the building was connected with other buildings on one side only, but before the loss happened it became connected on two sides; the policy was not thereby avoided, unless the jury find that the risk was increased, because there was nothing in the policy rendering the same void by any mere alteration.

ACTION OF COVENANT upon a policy of insurance on the plaintiff's dwelling-house, alleged to have been consumed by fire. The defendants set up three pleas in bar, upon the replication to the first of which a verdict was found for the plaintiff.

In the second plea, defendants admitted making the policy

and the burning of the house, as stated in the declaration, but averred that after making the policy, and before the fire, viz., on the eleventh December, 1800, plaintiff conveyed one-half in value of the house to one Harris, in fee-simple, reserving therein to himself a term of seven years, which term plaintiff assigned, on the twelfth of December, to Harris and one Gorham, so that at the time of the fire plaintiff was not owner of the house, according to the terms of the policy. This policy was afterwards, on the twelfth January, 1802, declared null and void by certain trustees of the company, according to the rules thereof. The replication to this plea alleges that at the time of the deed to Harris, he reconveyed the premises to plaintiff by mortgage, to secure the payment of a certain sum of money, which sum has never since been paid; that by the lease to Harris and Gorham, rent was reserved to plaintiff, payable quarterly, with a right of re-entry in case of non-payment of the rent. To this replication defendants demurred.

The third plea set forth that, before making the policy declared on, plaintiff described the building as being connected with other buildings on one side only, in consequence of which fact the premium was agreed upon and the policy made; but afterwards, before the fire, a frame building was erected on ground adjoining plaintiff's house, and joined to his house, thereby rendering the risk greater; and at the time of the fire this frame building was burned with the house. Plaintiff replied that the premises were not repaired, enlarged or altered in such a manner as to render the risk of their being consumed by fire greater. To this replication, also, defendants demurred.

G. Blake, for the plaintiffs.

Amory, for the defendants.

SEWALL, J. The first objection made for the defendants is, that the plaintiff, at the time of the loss, had no interest in the building originally insured to him by the policy in the case.

The facts admitted by the pleadings are, that, after the issuing of the policy, the plaintiff sold and conveyed to Thomas Harris a part of the building insured, reserving a term of seven years in the premises; and that Harris at the same time reconveyed them to the plaintiff, in mortgage, to secure the purchase-money. And it appears that the occupants, at the time the building was burnt, held under a lease from the plaintiff, upon a rent payable to him quarterly.

The sale and contracts between the plaintiff and Harris, af-

fecting a part only of the premises insured, it is a question for the jury to determine, what interest the plaintiff retained, and the value of it. It may be further observed that a sale and reconveyance by mortgage to secure the purchase-money, executed at one time, are, for many purposes, to be regarded as one instrument. And taking all the writings together, the actual sale of the property insured, as to the moiety affected by these contracts, was, substantially, and, in answering a question of the interest of the plaintiff, to be considered as, a conditional sale after the expiration of seven years. This objection does not arise upon the terms of the contract. The eighteenth article, especially if we connect with it the second article, imports a continuance of the contract, notwithstanding an alienation of the premises insured. It seems to have been the intent of the parties, that, in this mutual insurance, although the insured is at liberty, upon an alienation, to surrender his policy, or to transfer it, yet that his deposit and personal responsibility are retained by the company until a surrender, or an acceptance of the assignee by an entry in the transfer books of the company.

But, however this may be, the objection, if the facts had warranted it, must upon general principles prevail. It is a maxim of public policy, important to good morals, and for the prevention of frauds in contracts of this nature, that gaming insurances, insurances without interest, are unlawful and of no validity. It is incumbent, therefore, upon the party claiming a loss upon a policy of insurance, to show an interest in the subject of it, and in the event insured against, and his demand must appear to be for an indemnity, and not for a wager, become successful, as in this instance, by a public calamity. An objection of this kind is not supported by showing contracts affecting the formal title of the plaintiff, in a part only of the subject of the insurance. His interest in a part remains the same; and perhaps substantially, and for the purpose of repelling this objection, is to be considered as unaltered in the whole of the premises insured.

Upon the whole, it is the opinion of a majority of the court, that the replication to the second plea in bar is sufficient in law.

The second objection is, that certain alterations, in reference to the representation of the state of the building insured when the policy was effected, had been made by the party insured, whereby his policy was vacated, and the defendants were discharged from this insurance before the loss happened. This objection may be examined upon general principles, and upon

the terms of the contract. The estimate of the risk undertaken by an insurer must generally depend upon the description of it made by the insured or his agent: *Marshall*, 335. A mistake or omission in his representation of the risk, whether willful or accidental, if material to the risk insured, avoids the contract: *Id.* 339. And where the estimate of the risk depends upon the continuance of the material circumstances represented to the insurer, these are not to be altered to his detriment by any act of the insured, without a like effect upon the contract.

But to what degree is the insured restrained in this respect? If every, the least, alteration or enlargement of a building insured against fire, is necessarily and of course material to the risk, and, whenever it is made by the act or consent of the insured, is to vacate the policy, unless it should be renewed by the insurer—so close a restraint upon the party would place contracts of this kind in a state of complete uncertainty, and would render them so inconvenient as wholly to prevent them. This degree of restraint will not be contended for. But in the argument for the defendants it has been contended that the enlargement of a building, represented to be contiguous to other buildings on one side only, to the effect of making it contiguous on two sides, is, under all possible circumstances, a material alteration, which ought to discharge the policy, and that it is to be considered in the light of a departure from the voyage described in a marine insurance, and must have a similar effect upon a policy to insure against fire.

The true reason why, in a case of marine insurance, a deviation discharges the insurer, is not the increase of the risk; but that the party contracting has voluntarily substituted another voyage for that which was insured: *Lavabre v. Wilson*, *Marshall*, 186, 394. This change of the voyage determines the contract from the time it happens. The same strictness is not requisite in an insurance against fire, where the building, although enlarged or repaired, remains the same; and it is only necessary to guard the insurer from an increase of his risk, by an alteration of the building insured. And if an alteration of the kind alleged in this case may be made, under any circumstances, without increasing the risk of the insurer, there can be no reason, upon general principles, that it should determine the policy. Suppose, for instance, the subject of the insurance to be a wooden building, separated at the distance of a few feet from a brick wall in another building, and to be enlarged and made contiguous to the brick wall; it is obvious that such an

alteration may diminish, and not increase, the risk. And if this may be reasonably supposed in any case, then, whether the enlargement of a building insured has increased the risk of the insurer, is a question of fact to be determined by the jury.

The parties to this contract appear to have been aware of the inconvenience which a minute restraint in this respect would produce to the insured, and the effect upon the policy from alterations in the building insured, has not been left as a question of construction upon general principles, but has been regulated by express stipulations in the contract, which must determine the law between the parties.

The value, materials, and uses of any building proposed to be insured, and its situation relative to other buildings, and the consequent estimation of the rate of hazard, are understood to be represented by agents appointed for the purpose, who are to state and certify these circumstances to the trustees of the company, by whom, and at whose discretion, the policy is to be issued. (Article 7.) By the preceding article, the trustees are authorized to annul a policy, whenever the insured shall repair or enlarge his building, or appropriate it to other purposes than those mentioned in the policy, "thereby rendering the risk greater," unless the insured will add to his premium an equivalent in the estimation of the trustees. By a subsequent article, this power of the trustees is not to extend to any case where a building "becomes more or less hazardous," by means not under the control of the insured. By these stipulations, we discover what, in the intentions of the parties to this contract, was to be estimated a material alteration from the representation given of the building insured. Whether the alteration is by repairs, by enlargement, or by a new appropriation of the building, it must, in fact, render the risk greater, the building must become thereby more hazardous, or it is not material, and is not allowed to affect the contract.

The averment, therefore, in the plea of the defendants, in the case at bar, that by the enlargement of the building insured, the risk had been increased, is material, and must be maintained, or their plea is insufficient. The traverse of that averment is confessed by the demurrer, and the replication must be adjudged sufficient. And it is the opinion of a majority of the court that the replication to the third plea in bar is good, and sufficient in law.

PARKER, J., concurred.

PARSONS, C. J., had been of counsel in the cause, and gave no opinion.

SEWALL, J., then observed that the judges SEDGWICK and THATCHER, who were not at this time present in court, did not perfectly concur in the opinion which had been delivered, but had finally consented that judgment should be rendered by the two justices who had concurred, in their absence, and this the rather as the judgment is open to a writ of error.

The courts of other states have frequently recognized the authority of this case. Thus, in *Fowler v. Aetna F. Ins. Co.*, 6 Cow. 676, and *Jolly v. Baltimore Eq. Society*, 1 Harr. & Gill, 306, it is cited with approval. In New York it is cited as to a right to repair unless there is a contrary stipulation, in *Townsend v. Northwestern Ins. Co.*, 18 N. Y. 175; and in *Hitchcock v. Northwestern Ins. Co.*, 26 N. Y. 69, to the point that any change of title which does not deprive the insured of an insurable interest does not avoid the policy; and again on this point in *Savage v. Howard Ins. Co.*, 52 N. Y. 507.

HAMILTON v. CUTTS'S EXECUTORS.

[4 Mass. 349.]

ACTION ON COVENANT OF WARRANTY.—A plaintiff is entitled to recover on a covenant of warranty, though he may have voluntarily yielded up his possession; provided the title to which he yielded be good, and paramount to that of his warrantor.

PAROL EVIDENCE OF OUSTER.—In an action upon a covenant of warranty, parol evidence is admissible to show an ouster.

ACTION for the breach of a covenant in a deed executed by defendant's testator, purporting to convey one hundred acres of land to plaintiff in fee-simple. The deed bore date in the year 1774, and contained a covenant of warranty. The declaration charged that, before and at the time of the execution of the deed, David Moore was the owner in fee of sixty acres part of the granted premises, and that he conveyed his right therein to one McCrealis, who, in the year 1792, entered into possession of said sixty acres, evicted the plaintiff therefrom, and has ever since held possession.

Defendants traversed the alleged eviction, but on the trial admitted Moore's right to the sixty acres, and the conveyance thereof to McCrealis.

Testimony was admitted against defendant's objection, from which it appeared that McCrealis called upon plaintiff, and claimed the sixty acres; that plaintiff acknowledged that he had

a right to but forty acres; had received back from Cutts part of the money paid for the one hundred acres; and expressed an intention of suing Cutts unless he repaid plaintiff the whole money for these sixty acres; that McCrealis did, in the year 1792, with plaintiff's consent, enter and take possession of the sixty acres, and has ever since held quiet possession thereof.

Pursuant to the direction of the court, the jury found for the plaintiff. The defendant then moved for a new trial.

Mellen, in support of the motion, contended that to give the party evicted a remedy against the warrantor, an eviction must be shown by a judgment at law; or at least must be shown to have been made against the party's will.

Emery, for the plaintiff, urged that it would have been but incurring useless expense to proceed to law, when the plaintiff and his warrantor both knew that the title was in McCrealis.

By Court, PARSONS, C. J. This is an action of covenant broken, on a deed of the defendant's testator, conveying one hundred acres of uncultivated land, with general warranty. The plaintiff assigns, as a breach of this covenant, that at the time of the conveyance, one Moore was lawfully seised in fee of sixty acres, parcel of the said one hundred acres, and that afterwards one McCrealis, holding Moore's title, had entered into possession of, and evicted the plaintiff from, the said sixty acres. The defendants traverse the eviction, and issue being joined thereon, a verdict is found for the plaintiff. The cause now comes before the court upon a motion for a new trial by the defendants for a supposed misdirection of the judge at the trial.

The first objection is, that the judge admitted parol evidence to prove the eviction, which the counsel for the defendants contend can only be proved by the record of a judgment at law. And we are all of opinion that to prove an eviction according to its strict and technical meaning, a judgment of court is necessary. But we are inclined to give to the term a more extended signification, and to understand it in that case as synonymous with ouster.

But, secondly, it is contended that here was no legal evidence of an ouster, because the dispossession took place with the consent of the tenant in possession.

It is true that, if the tenant consents to an unlawful ouster, he cannot afterwards be entitled to a remedy for such ouster. But an ouster may be lawful; and in that case the tenant may

yield to a dispossession, without losing his remedy on the covenant of warranty, which in this state is a personal action of covenant broken. (See *Gore v. Brazier*, ante, 182.) There is no necessity for him to involve himself in a lawsuit to defend himself against a title which he is satisfied must ultimately prevail.

But he consents at his own peril. If the title, to which he has yielded, be not good, he must abide the loss; and in a suit against his warrantor, the burden of proof will be on the plaintiff; although it would be otherwise in case of an eviction by force of a judgment at law, with notice of the suit to the warrantor. For in such case, unless it be obtained by fraud, the judgment itself will be plenary evidence.

In the case at bar, it appears that McCrealis had a good title to the sixty acres, paramount to the title of Cutts. And the plaintiff, by consenting to his taking possession, did not lose his remedy for this lawful ouster against his warrantor.

Judgment according to the verdict.

It is well established that a person can recover on a covenant of warranty, when he yields possession to one having a paramount title, and a judgment of eviction is not necessary. But then he has the burden of showing the title to which he has yielded to be a paramount one. See, citing the principal case as authority: *Mitchell v. Warner*, 5 Conn. 521; *Sweetman v. Prince*, 26 N. Y. 233; *Merritt v. Morse*, 108 Mass. 276. And see, holding the same doctrine, *McGary v. Hastings*, 39 Cal. 360.

HUSSEY v. THORNTON.

[4 MASS. 405.]

WHEN RIGHT OF PROPERTY PASSES—DELIVERY.—A party agreed to sell certain goods on credit, with the condition that the vendee should furnish security for the price; he delivered the goods, however, without this security, declaring that he should not consider them as sold until the security had been given. The property, it was held, remained in the vendor, notwithstanding the delivery.

REPLEVIN for seventy-seven boxes of candles, attached by defendants as the property of Todd & Worthley, at the suit of certain of their creditors. It appeared in evidence that plaintiffs, being the undisputed owner of the candles in February, 1807, entered into a contract with Todd & Worthley for the sale of the same on credit; that plaintiffs said they would not deliver the candles until security for the purchase-money should be given, but allowed the captain of Todd & Worthley's vessel

to carry the candles to the wharf, and load some of them on board; that one of the plaintiffs then went to the captain and told him that they would deliver the candles, but should consider them as the property of the plaintiffs until the security was given. The candles were then laden on board, and four days afterwards attached.

Some evidence was produced tending to show an admission of the plaintiffs that they had obtained security for the candles prior to their delivery.

The judge then directed the jury, that if they believed plaintiffs had obtained security before the delivery of the candles, verdict should be found for the defendants; if otherwise, plaintiffs were entitled to verdict.

The jury gave their verdict for the plaintiffs; whereupon defendants moved for a new trial upon exceptions filed to the directions of the judge.

Mellen, for the defendants, urged that it was too late to rescind the contract or impose conditions after delivery to the vendees' agent; that, as between plaintiffs and other creditors of Todd & Worthley, the former were more in fault, and should suffer; the latter had a right to presume a property in those who held quiet possession so long: *Inglis v. Usherwood*, 1 East, 515.

E. Whitman, for the plaintiffs, contended that all the facts went to show that they did not intend to part with the goods until security had been given.

By Court, PARSONS, C. J. The question to be decided in this case is, in whom the property of the boxes of candles was, at the time the writ of replevin was executed. The case shows that they were once the undisputed property of the plaintiffs; and unless they have divested themselves of the title to them, they must recover in this action. They at first refused to sell them to Todd and Worthley, without some further security than their single assumpsit. They had probably forgotten at the moment of actual delivery, the condition for which they had stipulated; and a question arises, on the facts in the case, whether this was an absolute delivery, not revocable, or, if revocable, yet not revoked. We think they were bound to recollect the condition they had themselves made, and not to have delivered the candles until it had been complied with.

But we do not decide the cause on that point. Howard, being the agent of the vendees, had authority to receive the

goods, and to consent to any conditions attached to the delivery of them. He received them on board his vessel, under the declaration of one of the vendors, that they should not consider them as sold until they should receive further security. His so receiving them was an assent to that declaration, and his principals were bound by it. The property then continued in the vendors. Had the demands of these creditors originated while the goods were in the possession of Todd and Worthley, so that it might be fairly presumed that a false credit was given them, or had Todd and Worthley sold them *bona fide*, and for a valuable consideration, our opinion would have been otherwise. But, upon the facts in the case, there must be judgment according to the verdict.

DOW v. TUTTLE.

[4 MASS. 414.]

COLLATERAL AGREEMENT AFFECTING NEGOTIABLE INSTRUMENT. —

Where the payee of a note payable at a certain date agreed, at the time the note was given, not to demand payment until a certain time after maturity, this is a collateral promise, for the breach of which, if a consideration appear, an action will lie, but it cannot bar an action on the note when it becomes due.

ASSUMPSIT by the indorsee against the maker of a promissory note, dated February 16, 1804, payable in one year from date, to Benjamin Dow, by whom it was indorsed to plaintiff in July, 1805. The cause came before the court on a bill of exceptions filed by defendant. It appeared that defendant offered, at the trial, to prove that it was agreed by the promisor and promisee, and was the condition of the note that payment should not be demanded for five years, and that the promisee should not sell or part with the note; he also offered in evidence the following writing: "Cornville, February 15, 1804. These lines may certify that I, the subscriber, agree with James Tuttle to wait on him for the money due me till he turns his property to the best advantage. Benjamin Dow." Which, defendant offered to prove, was part of the same contract with the note, and that he had refused to sign the note until this agreement was made; that it was understood that Tuttle should have five years in which to dispose of his property; and that plaintiff was present, and had full knowledge of these agreements.

Upon plaintiff's objection, this evidence was rejected, and a verdict was found for the plaintiff.

Bridge, for the defendant, urged that the plaintiff's knowledge of all the circumstances, and of the agreements, and the fact that the note was not negotiated till after maturity, entitled the defendant to every defense he would have had against the original promisee.

Rice, for the plaintiff, contended that the agreement was no part of the original contract; and that parol evidence was not admissible to contradict an instrument in writing. *Meres et al. v. Ansell et al.*, 2 Wils. 275.

By Court, PARSONS, C. J. We are satisfied that the agreement, proposed by the defendant to be given in evidence at the trial, is not to be considered as a part of the contract with the note. That is a promise to pay to the promisee, or his order, a sum of money in one year. If the agreement was a part of this contract, it would be repugnant to the note, and destroy its effect. The agreement, although made at the same time, must be considered as a collateral promise of the promisee, for the breach of which, if there be a legal consideration, an action would lie. In chancery, it would be a sufficient ground for an injunction against the plaintiff, proving his knowledge of it before he purchased the note. And at law, perhaps, it may support a motion to stay proceedings, by granting imparlances, until the plaintiff could put it in suit consistent with the agreement. But, on this last point, it is not now necessary to decide.

As we consider the agreement as collateral to the note, the evidence was properly rejected, and a new trial cannot be granted.

Judgment according to verdict.

This case is regarded as a leading authority, showing that a collateral agreement cannot be set up as a bar to an action on a negotiable instrument. On this point, it is noticed as a leading case in *Allen v. Kimball*, 23 Pick. 476; and its authority on the same point is recognized in *Greeley v. Dow*, 2 Met. 178; *Shed v. Pierce*, 17 Mass. 629; *Perkins v. Gilman*, 8 Pick. 231; *Benedict Cowden*, 49 N. Y. 403; *Thurston v. James*, 6 R. I. 113; Daniel, on Negotiable Instruments, sec. 158.

KENNEBEC PURCHASE v. SPRINGER.

[4 MASS. 416.]

EXTENT OF CLAIM UNDER ADVERSE TITLE.—When one enters on land, claiming a right to it, and gains a seisin by such entry, the seisin shall extend to the whole tract which he claims; but when one enters without a claim of right, his seisin can extend no further than his actual possession.

WHAT CONSTITUTES A DISSEISIN.—To constitute a disseisin of the owner of uncultivated lands, the entry and possession of the disseisor must be such that the owner shall be presumed to know that there is a claim adverse to his title.

ACTION to recover possession of a certain tract of land, and verdict found for the plaintiff. The case came before this court on a motion for a new trial. The facts appear from the opinion

Whitwell, for the defendant.

Wilde, for the plaintiff.

By Court, PARSONS, C. J. The demandants sued the tenant in a writ of entry, counting on their own seisin within thirty years, and demanding the northerly half of lot numbered thirty-two in the second range of lots, of which they had been disseised by the tenant. On the trial, upon the general issue, the jury found a verdict for the demandants; and the tenant moves for a new trial, because, as he supposes, the verdict was against evidence, which is reported by the judge.

The tenant's title was under a release from James Springer, who, as the tenant alleges, entered more than thirty years before, and disseised the demandants; for no evidence was given that James entered claiming any title or right to the land.

The statute of 1786, c. 13, limits the time of suing any real action by any corporation, declaring on its own seisin, to thirty years next after such seisin. And the tenant insists that, by virtue of this statute, the demandants are barred by the disseisin done to them by his releasor in 1775, which is more than thirty years before the teste of their writ.

The law upon this subject seems to be very well settled. When a man is once seised of land, his seisin is presumed to continue, until a disseisin is proved. When a man enters on land, claiming a right or title to the same, and acquires a seisin by his entry, his seisin shall extend to the whole parcel, to which he has a right; for, in this case, an entry on part is an entry on the whole. When a man, not claiming any right or title to the land, shall enter on it, he acquires no seisin, but by the ouster of him who was seised, and he is himself a disseisor. To constitute an ouster of him who was seised, the disseisor must have the actual exclusive occupation of the land, claiming to hold it against him who was seised, or he must actually turn him out of possession. When a disseisor claims to be seised by his entry and occupation, his seisin cannot extend further

than his actual exclusive occupation; for no further can the party seised be considered as ousted; for the acts of a wrongdoer must be construed strictly, when he claims a benefit from his own wrong.

Let us now consider the evidence, as applicable to these principles. The demandants proved a title to the tenements demanded and a seisin in 1769. This seisin must be presumed to be continued until they were disseised, as they continued to claim title to the land. James Springer entered on the front lot, numbered thirty-two, in 1775. He continued in the occupation of that lot, improving and fencing a part, and living on it until he died; having in the year he entered, caused it to be run round by a surveyor, and trees marked on the lines. This land is not demanded. But the northerly half of lot numbered thirty-two on the second range is demanded. And it appears that when he surveyed the front lot in 1775, he at the same time caused the demanded premises to be run round by the surveyor, and the lines marked. There is no evidence that he ever fenced any part of the land demanded until 1792, which is within thirty years, or exercised any act of ownership on it, except that he sometimes cut the grass on a small meadow which was part of it. Having fenced a part in 1792, he conveyed the premises to the tenant, who entered and has occupied the same under his deed ever since.

On considering the evidence, we are satisfied that the demandants were not disseised until 1792, by the entry of the tenant; that the running round the land by a surveyor, and marking the lines by the direction of one who claims no title to the land, is not such an exclusive occupation of the land as can amount to an ouster or disseisin of the demandants. Neither can the occasional cutting of the grass on the meadow by Springer, who does not appear to have claimed the land, amount to a disseisin.

To constitute a disseisin of the owner of uncultivated lands by the entry and occupation of a party not claiming title to the land, the occupation must be of that nature and notoriety, that the owner may be presumed to know that there is a possession of the land adverse to his title, otherwise a man may be disseised without his knowledge, and the statute of limitations may run against him, while he has no ground to believe that his seisin has been interrupted.

As the tenant set up no title prior to 1792, but relied entirely on the statute as a bar, and as it appears to us, from the facts

reported, that the demandants were seised within thirty years next before the teste of their writ, we are of opinion that the conclusion made by the jury from the evidence in the cause was legal, and that their verdict must stand.

Judgment according to verdict.

The Massachusetts courts regard this case as high authority on the doctrine of adverse possession. It is cited on this point in *Magoun v. Lapham*, 21 Pick. 139; *Allen v. Holton*, 20 Id. 465; *Bates v. Norcross*, 14 Id. 228; *Thomas v. Marshfield*, 13 Id. 250; *Jackson v. Boston, etc., Corporation*, 1 Cush. 576; *Cook v. Babcock*, 11 Id. 210; *Stearns v. Palmer*, 10 Met. 36; *Blood v. Wood*, 1 Id. 535; *Boston v. Richardson*, 105 Mass. 372; *Crandell v. Taunton*, 110 Id. 421; *Bellis v. Bellis*, 122 Id. 417. Elsewhere it is very highly regarded. It is cited in *Watrous v. Southworth*, 5 Conn. 311; *French v. Pearce*, 8 Id. 444; *Huntington v. Whaley*, 29 Id. 397. See 3 Washburne on Real Estate, 494.

KIMBALL v. CUNNINGHAM.

[4 MASS. 502.]

RIGHT OF PARTY TO RESCIND CONTRACT.—Where a party to a contract attempts to rescind a sale, or an exchange of chattels, for fraud practiced by the other party, he cannot retain any part of the consideration he received upon the sale or exchange.

TROVER for two steers. It appeared that plaintiff and defendant had agreed to exchange horses; that defendant was to deliver the steers and a note of one Phillips, together with his horse, to plaintiff, and was to receive plaintiff's horse, and have his own note, which plaintiff held, delivered to him; that the bargain was executed, the plaintiff selling his horse as a sound one, and the defendant agreeing to pasture the steers a week for plaintiff. The defendant finding the horse he had received was unsound, returned the horse, and refused to deliver the steers; and since the commencement of this action had brought suit against plaintiff for selling an unsound horse, which suit was pending at the time of the trial.

Defendant offered evidence of plaintiff's fraud, and of the return of the horse originally owned by plaintiff. This evidence was rejected, and the jury were charged that if they believed the contract between the parties to be an entire one, and that it was a contracting operating, according to the true intention of the parties, as a sale of any of the articles which were the subjects of it, then the property of the steers was thereby vested in the plaintiff, who would be entitled to recover; but if they did not believe the contract was an entire one, or that if it was en-

ture, yet, according to the intention of the parties, executory, verdict should be given for the defendant.

Verdict was found for the plaintiff, and defendant moved for a new trial.

T. Bigelow, for the defendant.

A. Bigelow and T. Blake, for the plaintiff.

By Court, PARSONS, C. J. [After reciting the report of the judge.] When a horse is sold upon an implied warranty that he is sound, and at the time of the sale the vendor knows that he is not sound, this is such a fraud in him as will render the contract void, at the election of the vendee. If he chooses to consider the contract as void, he must return the horse within a reasonable time, and then he may maintain a general *indebitatus assumpsit* for the purchase money, as money had and received to his use. If he had exchanged horses and given money as boot, he may not only maintain that action for his money, but also trover for the horse he parted with in exchange.

But he ought not to retain any part of the consideration he received upon the sale or exchange; as, if in the exchange he received money in boot, he ought to return, not only the unsound horse, but also the money he received. For he shall not compel even the fraudulent seller to an action, to recover back the property he has parted with in the exchange. This rule applies only to the case of an implied warranty on a fraudulent sale or exchange. But the party defrauded is not obliged to consider the fraudulent contract as void, but may, at his option, maintain an action of deceit or a special *assumpsit*, and recover damages (if he has sustained any) for the fraud. If the warranty be express, his remedy, either on a fraudulent sale or exchange, must be by an action of deceit or by a special *assumpsit*.

In the present case, the evidence offered was to prove a fraudulent exchange, with an implied warranty that the horse was sound, when the vendor knew that he was unsound. The defendant had, therefore, his option to consider the bargain void. If he chose so to consider it, he ought to have returned all the property that he received on executing the contract. He ought to have returned the horse, and his own note that was delivered up to him by the plaintiff; or, if canceled, the money to pay it. Had this been done, we are satisfied that he might have maintained trover for his horse, and for Phillip's note, which he delivered to the plaintiff, and the plaintiff's property in the steers would have been disannulled.

But, in fact, he still has the benefit of the note, which the plaintiff delivered him, to which he can have no claim, if the contract be void. For this reason, we are satisfied that he cannot defend himself in this action upon the ground that the exchange was void.

There is another important fact stated—that after he returned the unsound horse, he commenced an action of deceit against the plaintiff, to recover damages for the fraud, which action is still pending; and not an action of trover for his horse, which he had delivered the plaintiff. By this action, it is also very clear that he has made his election to consider the contract as subsisting, and to recover damages for the breach of it. And if the contract be considered as subsisting, the plaintiff's property in the steers is not annulled, and the evidence was very properly rejected.

The verdict must stand, and judgment be entered accordingly.

AYER v. HUTCHINS.

[4 Mass. 370.]

DEFENSES AGAINST NOTE IN HANDS OF INDORSEE.—Where an indorsee of a promissory note receives it under circumstances which might reasonably create suspicions that it was not good; as receiving it after payment has been refused, or some time after it is payable, or when the indorser is not to be liable on his indorsement, it will be subject, in the hands of the indorsee, to any legal defense which might be made against the payee.

VOID AGREEMENT.—An agreement to indemnify an officer against a voluntary escape of a prisoner is void as against public policy.

ASSUMPSIT on a promissory note made by defendants payable to one Page or order, and by him indorsed to plaintiff as follows: "For value received, pay the contents to Richard H. Ayer, I being no way liable as indorser." Verdict was found for the plaintiff, and a bill of exceptions filed, from which it appeared that evidence of the following facts to prove that the note was given for an illegal consideration, was rejected: That Page, the payee of the note was, at its date, a deputy sheriff, and then had in his custody one Eaton, whom he was conveying to prison in York, by virtue of a certain execution; that Page proposed to give Eaton the liberty of the prison yard, and to indemnify Page for any damage he might sustain by Eaton's escape while on the way to prison, or by a breach of the bond Eaton was to give for the prison liberty; the defendants gave

Page the note upon the express agreement that the note should be returned in case no escape was made; that Page voluntarily discharged the prisoner without taking him to jail; and that eight months after the date thereof, the note was negotiated to plaintiff, without his knowledge of these facts, and for the benefit of Page.

Emery, for the plaintiff.

Dana, for the defendant.

By Court, PARSONS, C. J. The plaintiff declares on a promissory note given by the defendants to one Philip Page, payable to him or his order on demand, and indorsed to the plaintiff. On the general issue, the defendants offered evidence to prove that the note was indorsed to the plaintiff about eight months after it was given, by a special indorsement, purporting that the indorser was not to be liable in any way for the payment; that the indorsement was made without the knowledge of the plaintiff, and for the benefit of Page, the original promisee; and that the note was fraudulently obtained by Page. And this evidence was rejected by the judge.

The first question for our consideration is, whether, as between the parties to this action, fraud could legally be given in evidence to defeat the recovery by the indorsee. By virtue of the statutes against gaming and usury, negotiable notes, given for a gaming or usurious consideration, are absolutely void in the hands of innocent indorsee. But at common law, the promisor cannot give in evidence against an innocent indorsee, who came honestly by the note, without any reason to suspect that it was not good, any illegality in the consideration, or a subsequent payment: *Brown v. Davies*, 3 T. R. 80. If the indorsee receives the note under circumstances which might reasonably create suspicions that it was not good, he ought, before he takes it, to inquire into the validity of the note; and if he does not, he must take it subject to any legal defense, which might be made against a recovery by the promisee. And it has been determined that the indorsement of a note, after payment has been refused, is a circumstance which ought to awaken the suspicion of the indorsee, and to lead him to further inquiries before he takes it; and that a note indorsed some time after it is due, furnishes a presumption that it has been dishonored; because it may reasonably be inferred that the holder of the note would prefer receiving the money due, if payment could be had, to a negotiation of the note.

A note payable on demand is due presently. In this case, the note had been due eight months before it was indorsed; a length of time sufficient to induce suspicions that the promisors would not pay it, and to cause some inquiry to be made, whether it had, in fact, been dishonored, or why payment had not been made. If there was no other circumstance, this would be a good reason to let the defendants into any defense which could legally be made by them, if Page were the plaintiff.

There is, however, another fact of importance. It was alleged that Page was not to be liable on his indorsement, if the defendants refused payment. A caution of this kind must certainly induce an indorsee to believe that payment had been demanded, or that the demand had been neglected from a certainty of refusal, unless the indorser assigned some other reason. An indorsement of this nature, made eight months after a note is due, is enough to charge the indorsee with such negligence in making further inquiries, as will subject him to the same defense that might be made against the indorser.

But evidence was also offered, that the indorsement was in trust for the indorser himself. If this was the case, whether the note was indorsed before or after it became due, we are satisfied that any evidence may be admitted against the trustee, which might have been admitted against the *cestui que trust*. if he had sued the note as promisee.

The next question is, whether the defense offered and rejected, would have supported a legal defense against Page. Page was a deputy sheriff, having a prisoner in custody on execution, whom he was carrying to jail, and having proposed to the defendants to procure for the prisoner sureties to entitle him to the liberty of the prison-yard, the defendants agreed to give him bond to indemnify him against the escape of the prisoner, either before he was committed, or after he had the liberty of the yard; and no scrivener being present to write a bond, the note was made and given, upon the express agreement of the defendant and Page, that the note was to be void, if no escape was committed; otherwise he was to retain it as an indemnity. But Page, without proceeding to the jail with his prisoner, voluntarily discharged him.

If these allegations had been proved against Page, it is very clear that he could not have recovered. The only ground on which he could claim payment of the note, is as an indemnity. The escape contemplated by the parties before the prisoner was committed, must have been an escape against the will of the

officer; but there was no escape against his will, for he voluntarily discharged his prisoner, and is entitled to no indemnity against his own wrong. And if the parties had contemplated a voluntary escape, then the consideration of the note would be illegal; for an agreement to indemnify an officer for a voluntary escape is void, as against the policy of the law.

As we are of opinion that the evidence ought to have been admitted, the verdict must be set aside, and a new trial granted.

The authority of this case, so far as it lays down a rule, as to what will render a negotiable instrument void, in the hands of a holder, may now be questioned, in view of the established doctrine, that suspicious circumstances alone will not invalidate the instrument, but there must be *mala fides* shown on the part of the holder. The court say: "If the indorsee receives the note under circumstances which might reasonably create suspicions that it was not good, he ought before he takes it, to inquire into the validity of the note, and if he does not he must take it subject to any legal defense." This was the rule formerly adopted, but which is now discarded, on the authority of *Goodman v. Harvey*, 4 Ad. & El. 870, which after much fluctuation in the English law, settled the rule which has since been approved by the majority of our courts. It is now held that it is a question of *mala fides* in the holder, and that suspicious circumstances alone do not show this *mala fides*. This is the language of a careful writer: "In the United States, the decisions of the courts have varied, some following the rule declared in *Gill v. Cubitt*, but by far the greater number concurring in the principle which has been finally established as the law of England. Chancellor Kent in his Commentaries embodies the views taken in *Gill v. Cubitt*; but at that time the present prevailing doctrine had not been re-established, and it is to be supposed that he merely incorporated in his text, the then existing decisions of the English courts. But both upon principle and authority, it is safe to say that the experience of the commercial world, and of the courts before which the doctrines here discussed have so often passed in review, have satisfied jurists, as well as men of business, that the interests of commerce are best subserved by the liberal view which promotes the circulation of negotiable instruments; and that the *bona fides* of the transaction should be the decisive test of the holder's rights:" 1 Daniel on Neg. Instrs., 775. The courts of Massachusetts now follow the doctrine as here stated, and ably expounded in *Goodman v. Simonds*, 20 How. 367; see *Worcester Bank v. Dorchester Bank*, 10 Cush. 481. In *Spooner v. Holmes*, 102 Mass. 507, the court say: "It is now well settled that the bearer of a bank bill which has been stolen from the bank may recover the amount from the bank, unless it is proved that he did not take it in good faith and for valuable consideration, and that his knowledge of suspicious circumstances is immaterial unless amounting to proof of want of good faith. * * * And, according to the great weight of authority, the same rule applies to bills of exchange and promissory notes payable to bearer: *Goodman v. Simonds*, 20 How. 367."

Probably next to *Goodman v. Simonds*, the best considered case on this subject is *Hamilton v. Vought*, 34 N. J. L. 187, where Beasley, C. J., in a very able opinion, traces the course of adjudications on this subject, and shows what doctrine is now generally accepted; and he concludes approv-

ing of *Goodman v. Simonds*, which repudiates the doctrine that suspicious circumstances will *per se* vitiate the title to commercial paper. He says: "The rule was that to defeat the note circumstances must be shown of so suspicious a character that they would put a man of ordinary prudence on inquiry; and by force of such a rule, it is obvious every case possessed of unusual incidents would, of necessity, pass under the uncontrolled discretion of a jury. An incident of the transaction from which any suspicion could arise was sufficient to take the case out of the control of the court. There was no judicial standard by which suspicious circumstances could be measured before committing them to the jury. And it is precisely this want which the modern rule supplies. When *mala fides* is the point of inquiry, suspicious circumstances must be of a substantial character, and if such circumstances do not appear, the court can arrest the inquiry. Under the former practice, circumstances of slight suspicion would take the case to the jury; under the present rule, the circumstances must be strong, so that bad faith can be reasonably inferred. Thus the subject has passed from the indefinite to the comparatively definite; from the intangible to the comparatively tangible."

The Massachusetts courts have formerly cited the case with approval; and on some points, as the invalidity of the contract, and on the effect of a note considerably overdue, its authority is sound. See, citing the principal case, *Thompson v. Hale*, 6 Pick. 261; *Dyer v. Homer*, 22 Id. 256; *Bills v. Comstock*, 12 Met. 470; *Kendall v. Robertson*, 12 Cush. 158; *Williams v. Cheney*, 3 Gray, 222; *Pine v. Smith*, 11 Id. 40.

In regard to what shall be deemed a reasonable time for presentment for payment of a note payable on demand, no certain rule was, or possibly could be, adopted. But now, by statutes, the period is defined, as in Massachusetts, which is sixty days: Gen. Stat. 1860, p. 293. In Connecticut, a note payable on demand must be presented within four months, or it shall be considered overdue or dishonored: Gen. Stat. 1875, p. 342. In California, the period is six months, if without interest: Civil Code, sec. 3248.

INHABITANTS OF STOUGHTON, ETC., v. BAKER.

[4 MASS. 522.]

LIMITATION OF FISHERY GRANT.—A grant of a dam and a weir upon a river, with the exclusive right to take fish from the river below the dam, is held under the limitation that a sufficient and reasonable passage-way shall be allowed for the fish in their passage up the river; and this limitation being a public right, is not extinguished by any inattention or neglect in compelling the owner to comply with it.

GOVERNMENT TO PROTECT SUCH PUBLIC RIGHT.—The government may compel the private owners of dams to allow this free passage as a public right, but any injury suffered by the private owners in consequence of such interference may be compensated for by an action at law.

LIABILITY AND AUTHORITY OF LEGISLATIVE COMMITTEE.—A committee appointed to make alterations, under their directions, of a private fishery grant, are not personally liable to those whom they employ, and as the exercise of their authority is personal, such authority cannot be delegated even to one of their own number.

SPECIAL action on the case. The plaintiffs declared that on the fifteenth March, 1805, the state legislature appointed Tillinghast, Loud, and Turner a committee, after due notice given, to order such alterations in the fishways of the several dams on Neponset river between the sea and Paul's bridge, or to cause such new fishways to be made around said dams, or either of them, as in their opinion or of the major part of them, should be sufficient for the passage of shad and alewives at the dams. It was resolved that the expenses incurred in making such alterations should be borne, one-fourth part by the inhabitants of the towns of Stoughton, Sharon and Canton, and three-fourths by the owners of the respective dams where the alterations were made. The action was for defendants' proportion of certain expenses incurred. A verdict was taken for the plaintiffs for the amount of their demand, subject to the opinion of the court on a case stated, containing the following: It was agreed that the above resolution was passed by the legislature; that defendants were seised in fee-simple of a water-mill and dam within the prescribed limits; that the committee having heard all the parties, ordered certain alterations to be made in the fishway through defendants' dam; that defendants refused to make the alterations until the spring following; that plaintiffs, afterwards, in the same year, notified Loud of the refusal, and Loud, who had been appointed a sub-committee to superintend the making of the various alterations; thereupon ordered plaintiffs to make the alterations upon defendants' dam, in a faithful and prudent manner; that in so making the alterations, expenses to the amount of two hundred and seventy-four dollars and fifty-three cents were incurred; of which sum one hundred and fifty dollars and seventy-one cents was expended in paying the committees for their time and in reimbursing them for moneys spent in performing their offices. The case further stated, that defendants' dam was an ancient one, and the title thereto derived from Israel Stoughton, who acquired his right in the year 1633, by grants from the town of Dorchester, in which the land then was; that the grants to Stoughton were of a mill privilege and a weir adjoining, and an exclusive right to take shad and alewives between the weir and the bridge, which fish, it was conditioned, he should sell to the plantation at certain stipulated prices, and he was not to transfer the mill to any one without the consent of the plantation first had and obtained; that the grants to Stoughton were confirmed by the general court in 1634; and that no fishway was ever made

through the said dam until the year 1789, when the fishway, of which alteration was ordered to be made, was constructed pursuant to a resolution of the general court of February 17, 1789, at the expense of the towns of Stoughton and Sharon, on whose petition the resolution passed.

Jackson, for the defendants.

Wheaton, for the plaintiffs.

By Court, PARSONS, C. J. The plaintiffs found their claim on the resolution of the legislature recited in the declaration; on the alteration of the former sluice-way ordered by the committee therein appointed; on the refusal of the defendants to make that alteration seasonably; on the authority given by Mr. Loud, as a sub-committee, to the plaintiffs, to make that alteration, and on the plaintiffs' making it pursuant to that authority.

The defendants object to the claim of reimbursement of the money paid to defray the expenses of the committee; and we are satisfied this objection is well founded. The resolve is silent on this subject, and the only charge which it imposes on the owners of the dam is three-fourths of the expenses incurred in altering the sluice-way. The defendants also object to the claim for the expenses of making the alterations in the sluice-way, arguing that the legislature had no authority to pass the said resolve; because their dam is an ancient dam, derived from a grant by the town of Dorchester in 1633, held by them and by those whose estate they have therein, without any sluice-way for the passage of fish from that time to the year 1789, when the legislature first directed that a passage should be opened for fish—because, in the year 1633, a weir for the taking of fish was granted as appurtenant to their mill, by which the grantee, his heirs and assigns, had a several fishery between the dam and the sea, and that this grant of a weir was, in the same year, confirmed by the colony legislature, so that the public have no right for the passage of fish above or through their weir; because if the public have this right, it should be exercised by the intervention of a jury to describe the site and dimensions of the sluice-way, and not by a committee of the general court, who may, through error or mistake, order the whole dam to be prostrated, and thereby destroy or render useless the estate the defendants have in the mill; because if the public have not this right, but claim to take it for the public use, the commonwealth is bound by the constitution to make

a reasonable compensation to the owners, and not charge them with the expense of making the sluice-way.

The grants on which the defendants rely are made part of the case. The grant by Dorchester, relating to the dam, is in these words: "It is generally agreed that Mr. Israel Stoughton shall build a water-mill if he see cause." Then follows a grant to him of a weir adjoining to his mill; and no person is to cross the river with a net or otherwise, to the prejudice of the said weir; but Stoughton is to sell the alewives at five shillings per thousand, and the other fish at reasonable rates. The colony legislature, in 1634 confirmed the grant of the weir to Stoughton and his heirs, he agreeing to build and maintain a horse-bridge over the river.

The weir thus granted and confirmed amounted to the franchise of a several fishery at that place, but it extended to no other place on the river above it. And this franchise cannot be construed to include a right of excluding all fish from passing above the weir. The value of this fishery depends on the shoals of fish that enter the river to pass to the ponds above to cast their spawn; and if none were allowed to pass, the fishery would be of little value, and the public, to whom Stoughton was obliged to sell, would lose their supply, which was one of the considerations of granting the franchise.

We are therefore satisfied that this franchise, if it were not lost, would be no objection to the right of the public to have a convenient passage-way for the fish to ascend the river to the ponds. In examining the grants, this franchise is not appurtenant to the mill, but is a several independent interest, granted on conditions. And the case does not state that it was ever exercised by Stoughton, or by those who claim under him; and, at this time, we must presume that it is lost and gone by non-user.

The ancient grants by towns are very loosely expressed, and when a fee was intended, words of inheritance were seldom used. When a long possession by the grantee, his heirs or assigns, has followed, the original grant has uniformly been considered as a grant of a fee. In this case, we are therefore of opinion that Stoughton took a fee in the mill privilege, as it is usually called in this state. And having a privilege to build a mill, he necessarily had a right to erect a dam, to raise water sufficient to drive his mill.

But the right to build a dam for the use of a mill was under several implied limitations. One was to protect private rights,

by compelling him to make compensation to the owners of land above for, and damages occasioned by, overflowing their lands; another was to protect the rights of the public to the fishery; so that the dam must be so constructed that the fish should not be interrupted in their passage up the river to cast their spawn. Therefore, every owner of a water-mill or dam holds it on the condition, or perhaps under the limitation, that a sufficient and reasonable passage-way shall be allowed for the fish. This limitation, being for the benefit of the public, is not extinguished by any inattention or neglect, in compelling the owner to comply with it. For no laches can be imputed to the government, and against it no time runs so as to bar its rights.

If the government should, in its grant of a mill privilege, expressly or by necessary implication, waive this limitation, it would be bound. But it would be an unreasonable construction of the grant by Dorchester, to admit that by it all the people were deprived of a free fishery in the river above the dam, to which, until the grant, they were unquestionably entitled.

The public, therefore, having a right to the benefits of this limitation, as to the mill and dam of the defendants, there must be some remedy by which the public benefit may be secured. But this remedy, say the defendants, cannot be obtained by any authority of the committee of the general court, but should be sought for through the intervention of a jury. The legislature may make all laws not repugnant to the constitution; and we do not know that this law is repugnant to it. And the usage of the general court to appoint committees to locate and describe the site and dimensions of passage-ways for fish, is ancient, and has been long continued. But if a committee, thus appointed, should locate and describe a passage-way for fish, unnecessary and unreasonable, by which the property of the owner of the mill was injured without any public benefit, we do not admit that he would be without remedy. The owner holds his privilege subject to the limitation that a reasonable and sufficient passage-way should be allowed for the fish. Beyond this, the public has no interest, and private right is invaded. Any prostration of the dam by a committee, not within this limitation, would be an injury to the owner, for which he might appeal to his country, and have a remedy by the verdict of a jury.

Another objection made was, that if this resolution was constitutional, the legislature might authorize strangers to enter,

without right, on the freehold or lawful possession of another. This objection, supposing that strangers enter without right, is begging the question. For if the owner of the dam hold it under the limitation mentioned, that limitation must extend to give a right to the government to enter and remove obstructions, which, if not removed, would defeat the limitation.

In this action it does not appear that, at the trial, the defendants made any objection to the necessity or reasonableness of the alteration of the sluice-way ordered by the committee, on this ground; therefore, he has now no right to complain. It has been further argued that, if the resolve is constitutional, yet the plaintiffs cannot maintain this action for several reasons. The resolve authorizes the committee to order alterations in old passage-ways, or to direct new passage-ways to be made. Whoever, therefore, say the defendants, make these alterations, are agents of the committee; and the committee, who are answerable to their agents, must bring the action.

If this objection were to prevail, no committee would ever undertake the trust. And as their powers are to locate and describe the requisite alterations, but not to make them—if this objection should not prevail, it is argued that, after the committee have made the order, and given notice to the owner of the dam, they have executed all their powers, and it is the duty of the owner of the dam to make the alterations; and if he disobey the order, he may be punished by indictment. There might be some weight in this objection, if the authority of the committee were confined to the issue of orders; but they are expressly authorized to cause new fishways to be opened. The work may therefore be done under their direction, if the owner refuses to remove the obstruction which he has placed or continued.

But it is denied that the committee could authorize three towns jointly to make this alteration, so as to give them a joint action.

We think there is some weight in this objection, as it is not easy to conceive how a joint authority could lawfully be vested in three distinct independent corporations, who can act only by a major vote in distinct corporate meetings, by the committee under this general authority given them. But we do not think it necessary to decide on this point, because we are satisfied that the remaining objection is fatal against the action.

This objection is, that it was not competent for Mr. Loud, as a sub-committee, to execute any of the powers of the committee,

and therefore he could not authorize the plaintiffs or any other persons to make the alteration, so far as to give them a right of action to recover a compensation.

The authority given to the committee is, by the terms of the resolve, to be exercised by them, or the major part of them. The exercise of this authority is personal, and cannot be delegated. If it could be delegated, it might be delegated to any other man, as well as to Mr. Loud, one of the committee. If the committee, or a major part of them, had exercised the powers given them, it might have been thought by them reasonable to give the defendants time until the next spring to make the alterations; or they might have employed other persons than the plaintiffs to make them. However this might have been, it is extremely clear that the powers given to the committee must be exercised by all, or by the greater part, and that they could not be delegated to Mr. Loud, or to any other person.

For this reason the verdict must be set aside, and a general verdict be entered for the defendants.

The authority of this case is recognized in the federal courts on the limitation of grants. See *Charles River Bridge v. Warren Bridge*, 11 Peters, 558; *Holyoke Company v. Lyman*, 15 Wall. 514; and in reference to no time running against the government, on the maxim *nullum tempus occurrit regi*, *Armstrong v. Morrill*, 14 Wall. 144; *United States v. Hoar*, 2 Mas. 314; *United States v. Greene*, 4 Id. 431. On the limitation of a private grant, it is referred to in late cases in Massachusetts: *Commissioners v. Holyoke Water Co.*, 104 Mass. 446, 457; *Commonwealth v. Vincent*, 108 Id. 248; *Commonwealth v. Essex Co.*, 13 Gray, 248. In *People v. Platt*, 17 Johns. 211, Spencer, J., notices the case, and says: "In that case, the supreme court of Massachusetts held that a legislative resolution appointing a committee, who were authorized to require the proprietors of certain dams on Neponset river to alter them, in such a way as should be sufficient for the passage of shad and alewives at the dams, was a legal proceeding, not repugnant to the constitution. The opinion is founded on the ancient and long continued usage of the general court of Massachusetts, to appoint commissioners to locate and describe the site and dimensions of passage-ways for fish; and under the circumstances of the case, it was held that the right of the proprietor of the dam was subject to the limitation that a reasonable and sufficient passage should be allowed for the fish. The court, however, expressly say that any prostration of the dam, not within the limitation, would be an injury to the owner, for which he might appeal to his country, and have a remedy; and that if the government, in the grant of a mill privilege, expressly or by implication, waive this limitation, it would be bound. In the case, then, under consideration, the court said it would be an unreasonable construction of the grant to admit that by it all the people were deprived of a free fishery in the river above the dam, to which, until the grant, they were unquestionably entitled. Whether in that case the

Neponset river was navigable above the dam, is nowhere affirmed or denied; but it is perfectly clear that the court proceeded on local usages and customs, and not upon the general and received doctrine of the common law; for not a single case is referred to, nor is it even asserted that the principles advanced are sanctioned by the English common law."

HOLBROOK v. FINNEY.

[4 MASS. 506.]

NO DOWER IN MOMENTARY SEISIN.—A father conveyed land to his four sons in fee, who on the same day mortgaged the same land to the father to secure the payment of a sum of money and the maintenance of the father during life; it was held that there was only an instantaneous seisin in the sons, and therefore the wife of one had no claim to dower in the land.

CONSTITUTIONAL RIGHT OF LEGISLATURE TO CHANGE TENURE.—A statute converting existing estates in joint-tenancy into estates in common is constitutional, because not impairing vested rights, but rendering the tenure more beneficial.

ACTION for dower in a tract of land, which plaintiff demands by virtue of the seisin of her deceased husband, Ezra Finney. It was agreed that John Finney being seised of the premises in fee conveyed the same by deed bearing date March 13, 1876, to his four sons, of whom Ezra was one, in equal proportion, in fee, for the consideration of four hundred pounds; that immediately, and by a deed of even date, the four sons mortgaged the same premises to their father in fee, to secure the payment of the four hundred pounds, and a maintenance during his life; that Ezra died in December of the same year; that in 1787, the mortgagee foreclosed the mortgage for condition broken; that in 1790, the defendant, Robert Finney, became possessed of the premises, under an execution levied to satisfy a judgment against John Finney. On these facts it was submitted to the court whether the demandant was entitled to dower.

Thomas, for the plaintiff.

B. Whitman, for the defendant.

By Court, PARSONS, C. J. [After reciting the substance of the case as agreed by the parties.] The question before the court, upon these facts, is, whether Ezra Finney, the husband, was, during the coverture, so seised of the premises that the demandant has a right to her dower. He has not so seised, unless from the operation of the deed from his father to himself and his three brothers.

The tenant has made two objections: 1. That this conveyance was of an estate to joint-tenants, of which the demandant's husband was not the survivor; 2. That her husband had that instantaneous seisin only, which will not entitle her to dower.

It is settled that if an estate be devised to two or more, equally to be divided, they are tenants in common. The same construction is applied to a devise to two or more, share and share alike: Show. Parl. Cases, 210. Also the words equally to be divided, in a covenant to stand seised, or in the surrender of a copyhold, or in a deed appointing uses, create a tenancy in common: 2 Vent. 365-6; 1 Salk. 391; 1 Wils. 341-2. This construction has been adopted, because the words in equal shares, or equally to be divided, import a division *in futuro*.

The words in this deed are in equal proportion; and it is said that they do not imply a future division, but are applied only to the respective interests in the thing conveyed. On this ground they must be considered as wholly inoperative; for without them the grantees would have taken an equal interest in the lands granted. To give them operation, may they not be considered as equivalent to the words, in equal purparties or shares, and thus contemplate a future partition?

But it is not necessary now to decide this point, for by the statute of 1785, c. 61, passed three days after the execution of these deeds, it is enacted that all estates which had been, or which should be, aliened to two or more persons, shall be deemed to be tenancies in common, unless it be manifestly the intent of the alienor that they should be held as joint estates, with a saving to the survivor of any estate in joint-tenancy, before created and already vested in him. This statute has a retrospective effect, and comprehends this conveyance; and there seems to be no constitutional objection to the power of the legislature to alter a tenure, by substituting another tenure more beneficial to all the tenants.

If this objection had been pressed, it would have been unnecessary to consider it, as the statute of 1783, c. 52, in force when the deeds were executed, although repealed by the last-cited statute, had abolished the principle of survivorship among joint-tenants, and had enacted that, on the death of a joint-tenant, the joint estate of which he was seised should descend to his heirs. In consequence of these provisions, the wife of a joint-tenant is dowable, as on the death of her husband there could be no survivor, who would be in by a title paramount to her claim of dower.

The demandant must therefore recover, unless the second objection should prevail. It certainly is law that where the husband is seised but for an instant, of this seisin his wife shall not be endowed. The seisin for an instant is where the husband, by the same act, or by the same conveyance, by which he acquires the seisin, parts with it. Thus, if tenant for life, make a feoffment in fee, his wife shall not be endowed; for, by making the same feoffment which passed the fee, he acquired a fee: 2 Cro. 615. And if a joint-tenant make a feoffment, his wife shall not be endowed, for by the feoffment he was seised of a several estate but for an instant, which he acquired and parted with by the feoffment: Id. So, if a feoffment be to B. and his heirs to the use of C. and his heirs, the wife of B. shall not be endowed, for he was but an instrument; and the same feoffment which gave him the seisin, by the statute of uses, transferred it to C. Nor shall the wife of the conusee of the fine be endowed, when by the same fine the estate is rendered back to the conusor: 2 Co. 77 a.

Let us now compare the present conveyances with these principles; for the previous agreement may be laid out of the case. If the deeds pursue it, it is useless; and if they do not, we must be governed wholly by the construction of the deeds. The mortgage back to the father, from the terms of it, is of even date with the conveyance from him. They are, therefore, to be considered as parts of the same contract, and as taking effect at the same instant. The conveyance from the father took effect when he delivered his deed; the mortgage back took effect when the mortgage deed was delivered; but both being of even date, were delivered at the same time. The mortgagors were, therefore, seised but for an instant, taking an absolute estate in fee, and instantaneously rendering back a conditional estate in fee. These two instruments must, therefore, be considered as parts of one and the same contract between the parties; in the same manner as a deed of defeasance forms with the deed to be defeated, but one contract, although engrossed on several sheets; and no interval of time intervened between the taking and the rendering back of the fee.

But if the husband continued seised for any portion of time, however short, his wife would have been entitled to dower; as if the conveyance back had been made posterior in point of time, or by a deed distinct from the first grant. There is the case of *Nash v. Preston*, reported in Cro. Car. 190, illustrating and supporting these principles. In that case I. S. seised in

fee, bargains and sells the land to the husband for one hundred and twenty pounds, in consideration that the bargainee shall redemise it to the bargainor and his wife for twenty years, rendering a nominal rent, with a condition that if the bargainor, at the end of twenty years, paid back the one hundred and twenty pounds, the bargain and sale should be void. The bargainee accordingly redemised it, and dies. His wife shall have dower, because the land, by the bargain and sale, was vested in the husband. But it would have been otherwise if the land was in, and was out of the husband by one act. In the case at bar, the execution of the two deeds, they being of even date, was done at the same instant, and constitutes but one act.

The demandant, therefore, cannot support her claim, as her husband was never so seised as to entitle her to dower. According to the terms of the agreement, submitting the case to the court, the demandant must become nonsuit.

The courts particularly notice this case in reference to the constitutional right of the legislature to change tenure. On this point it is regarded with high favor: *Miller v. Miller*, 16 Mass. 61; *Simons v. Hanover*, 23 Pick. 193; *Davison v. Johanot*, 7 Met. 397; *Clark v. Cordis*, 4 Allen, 475; *Brevort v. Grace*, 53 N. Y. 258; *Cooley on Const. Lim.* 360.

On the point of instantaneous seisin: *Thaxter v. Williams*, 14 Pick. 54; *Flint v. Arnold*, 2 Met. 626; *King v. Stetson*, 11 Allen, 406; *Burns v. Thayer*, 101 Mass. 428; *Hubbard v. Norton*, 10 Conn. 434; *Mayberry v. Brien*, 15 Peters, 39.

PRESCOTT v. TRUEMAN.

[4 Mass. 627.]

WHAT CONSIDERED AN INCUMBRANCE.—A paramount right is an incumbrance within the meaning of a covenant in a conveyance of land, that the same is free from all incumbrances.

DAMAGES FOR BREACH OF COVENANT AGAINST INCUMBRANCES.—In an action on a covenant against incumbrances, if the plaintiff has, at a fair price, extinguished the incumbrance, such price shall be the measure of damages; but if he has not removed the incumbrance he shall recover only nominal damages.

ACTION for the breach of a covenant against incumbrances.
The facts appear from the opinion.

Ward, for the defendant.

Bigelow, for the plaintiff.

By Court, PARSONS, C. J. The action is covenant broken, and comes before us on a general demurrer to the fourth count.

In this count, the plaintiff alleges that Trueman, on the twenty-sixth of September, 1800, being then seised in fee of certain lands in Westford, which seisin he acquired by a conveyance from Thomas Symmes, who was in by disseisin by his deed of that date granted, and sold the same to the plaintiff in fee, and covenanted that the said lands were free from all incumbrances. The breach alleged is that the heirs of the disseisee had, at the time when the deed was executed, a paramount right to the same lands.

All the facts contained in this count, which are well pleaded, are confessed by the demurrer. And the question is, whether this paramount right to the lands in the heirs of the disseisee, at the time of the grant to the plaintiff, is an incumbrance on the land granted. No authority in point on either side has been produced; and the question must be decided on general principles. On these principles we are of opinion that every right to, or interest in, the land granted, to the diminution of the value of the land, but consistent with the passing of the fee of it by the conveyance, must be deemed in law an incumbrance. We say consistent with the passing of the fee of the land by the conveyance, because, if nothing passed by the deed, the grantee cannot hold the estate under the grantor. Thus, a right to an easement of any kind in the land is an incumbrance. So is a mortgage. So, also, is a claim of dower, which may partially defeat the plaintiff's title, by taking a freehold in one-third out of it. And for the same reason a paramount right which may wholly defeat the plaintiff's title, is an incumbrance. It is a weight on his land, which must lessen the value of it.

It may be objected that, if a paramount right is an incumbrance, for which the grantee may recover damages, it would operate unreasonably and unjustly as between the parties to the covenant. For after the grantor had paid for the value of the lands in damages, the grantee would still hold it, and might never be disturbed by a dormant title. Or, if he should be afterwards evicted, the grantor would again be liable to the grantee on the warranty in consequence of the eviction.

If these inconveniences would follow from considering a paramount right as an incumbrance, the objection would have great weight, not only on this point, but also in cases of mortgages and claims of dower, which it is not disputed are incumbrances. But by duly attending to the rule in assessing damages, the objection will vanish. Where a subsisting easement is alleged

as the incumbrance, the injury arising from the easement, or the fair and reasonable price paid by the grantee to extinguish it, of which the jury will judge, is the measure of the damages. If a mortgage, which is a collateral security, is the incumbrance, the grantee can recover only nominal damages, unless he has removed it, because the mortgagee can compel the mortgagor to pay the debt by suing the principal security; but if the grantee has paid it, so that the mortgagor is discharged, the sum secured by the mortgage is the measure of damages. If a right to dower is the incumbrance complained of, if it be not extinguished by the grantee, he can recover only nominal damages. But if he has extinguished it, the jury will allow him in damages the fair price it necessarily cost him. For if this right be extinguished, it can never after be the foundation of any claim on the grantor.

So, in the case before us, if the plaintiff, the grantee, has not extinguished the paramount right, but it still remains against his title, he shall recover nominal damages only, for the reason on which the objection is founded. For the plaintiff shall not recover the value of the land against the grantor and still hold the land on a contingency that he may never be disturbed in his possession. Neither shall the grantor, the defendant, after having once paid the value of the land, be afterwards called on by the plaintiff on a subsequent eviction. But if it should appear to the jury, who may inquire of the damages, that the plaintiff has, at a just and reasonable price, extinguished this title, so that it can never afterwards prejudice the grantor, they will consider this price as the measure of damages.

The law thus settled will be generally convenient. For if we are mistaken in the law, the grantee can have no remedy on the usual covenants in our deeds of conveyance, until he is evicted. In the meantime, he may be unwilling to make improvements; and when he is evicted, the grantor may be unable to make him any compensation.

The covenant of seisin is not broken, for it is admitted that the grantor was seised; neither is the covenant of a right to convey broken, for a man seised has a right to convey; and on the warranty there is no remedy until after eviction.

In English deeds, there is sometimes inserted a covenant that the grantor has good right to convey an indefeasible estate in fee. On this covenant only nominal damages would be given, until the estate conveyed had been defeated, or the right to defeat it had been extinguished. This covenant is not usually, if

ever, introduced into our deeds of conveyance, and upon the construction of covenants against incumbrances is unnecessary.

In adopting this construction, we have not been governed entirely by arguments *ab inconvenienti*, but have used the language of these covenants in the popular sense of the country, and consequently in the sense in which it is generally understood by the parties to conveyances. A purchaser from one who is seised is not, therefore, obliged to wait in painful suspense until he be evicted before he can obtain an adequate remedy; but as soon as he can extinguish the incumbrance, he may call on his grantor for an indemnity.

Declaration adjudged good.

As to what shall be considered an incumbrance, this case is cited as authority in *Shearer v. Ranger*, 21 Pick. 448; *Bronson v. Coffin*, 108 Mass. 180. As to damages its authority is recognized in *Harlow v. Thomas*, 15 Pick. 68; *Brooks v. Moody*, 20 Id. 476; *Norton v. Babcock*, 2 Met. 517; where it is held, if the grantee extinguishes a paramount right at a fair and reasonable price, he may recover this price in an action on his covenant: *Harrington v. Murphy*, 109 Mass. 300; that nominal damages will be only allowed where the incumbrance has worked no disturbance and has not been extinguished. On the same point it is cited in *Briggs v. Morse*, 42 Conn. 260. In *Barnes v. Mott*, 64 N. Y. 402, it is cited by the court to show that upon paying off the incumbrance the grantee may have his action for the full amount paid. But this must be taken with the limitation that the amount shall be just and reasonable. In *Porter v. Bradley*, 7 R. I. 542, the court, citing this case, lays down a good principle, namely: that where the incumbrance is in its nature continuous, and one which the covenantee cannot remove, compensation in damages can be recovered in a sum equivalent to the injury sustained. In *Delavergne v. Norris*, 7 Johns. 359, it is cited, the court saying: "If the purchaser feels the inconvenience of the existing incumbrance, and the hazard of waiting until he is evicted, he may go and satisfy the mortgage, and then resort to his covenant. This is the rule as laid down by the supreme court of Massachusetts in *Prescott v. Truman*, and it is entitled to the highest respect."

FARNSWORTH v. CHILDS.

[4 MASS. 637.]

UNRECORDED DEED AS NOTICE.—A deed of conveyance, though not acknowledged or registered, will be good against a second purchaser with notice, and this notice may be either express or implied.

SAME.—Where a second *bona fide* purchaser had read a prior deed, but the grantee had neglected for two years to record it, and had permitted the grantor to remain in the open possession and occupation of the land, the first purchaser was held not entitled to relief, and the second entitled to claim the land.

TRESPASS quare clausum fregit. A verdict was taken for the plaintiff by consent, subject to the opinion of this court, on the following statement of facts: On the eleventh of June, 1805, John Farnsworth being seised of the premises, in fee, by his deed conveyed the same to plaintiff for the term of his life, *bona fide*, and for a valuable consideration; that on the thirteenth following one James Brazer, a justice of the peace, was called in to acknowledge the deed, and at John's request read the deed, saying that it would do well enough, and then took an acknowledgment of the same; that owing to the bodily infirmities of plaintiff, the premises were occupied under the direction and management of John, but for the plaintiff's use; that the deed was not recorded till October, 1807; that in June, 1807, James and William Brazer, partners, recovered judgment against John, by virtue of which execution issued and was levied on the premises in question, and seisin thereof delivered to William, who had no knowledge of the deed to plaintiff; that defendant, by directions of William, entered upon the premises, and cut and carried away a quantity of hay.

Dana, for the plaintiff.

Bigelow, for the defendant.

By Court, PARSONS, C. J. Upon this case the plaintiff moves for judgment upon the verdict, because one of the judgment creditors of the grantor well knew, before the execution was levied, that the close had been conveyed to the plaintiff, and the levy was therefore fraudulent, notwithstanding the plaintiff's neglect to record his deed. On the other side, the defendant moves to set aside the verdict, because there was no evidence that James Brazer, the justice, ever knew what lands were conveyed by the deed, his attention having been wholly confined to the tenure created by it, whether it was or was not created by suitable words; that if it must be presumed that James, when he took the acknowledgment, knew that the close was conveyed to the plaintiff by the deed, yet as there was no apparent change of possession, the occupation being in fact by the grantor, he might well presume that the conveyance was rescinded by the parties, or the close reconveyed to the grantor, the occupier. But, if the conveyance would be deemed good as against James, yet it should not affect William, the other partner, who, it is agreed, had no knowledge whatever of the conveyance; and as William must suffer if James suffers, neither ought to suffer by the laches of the plaintiff.

At common law a freehold estate could not pass but by livery of seisin, that the freeholders of the county might have notice of the conveyance. By a law of the colony of Massachusetts bay (1641-2) it was ordered that no alienation of any land, where the grantor remains in possession, shall be good against any persons but the grantor and his heirs, unless the deed be acknowledged before some magistrate, and recorded by the clerk of the county court. Afterwards, by another law, it was ordered that no alienation of any lands shall be good, unless by deed executed by livery of seisin, unless the deed be acknowledged and recorded. Thus, under the old colony laws, conveyances of land might be made by deed executed, and seisin delivered, or without livery of seisin, if the deed be acknowledged and recorded.

By the provincial statute of 9 Will. 3, c. 7, it was enacted that alienations of land by deed acknowledged and registered, should be good in law without any other legal ceremony. And that no alienation, unless made in that manner, should be legal, except against the alienor and his heirs. By this act, the common law conveyance by deed, with livery of seisin, was made void, except against the grantor and his heirs.

These provisions were re-enacted by the statute of 1783, c. 37, s. 4, now in force. By the construction of this statute, it has been held, that although the deed of conveyance be not acknowledged or registered, yet the conveyance to the first purchaser shall be good against a second purchaser, who had notice of the prior conveyance. The registry of a deed was required to give more general notice of the conveyance, than would result from livery of seisin, which was prescribed by the common law for the purpose of notice. But if a second purchaser has, in fact, notice, the intent of the registry is answered; and to permit him to hold against the first purchaser would be to convert the statute into an engine of fraud, instead of protection against it.

And it has very reasonably been determined that notice of the second purchaser may be either express or implied. It is express, when knowledge of the prior conveyance has, in fact, been communicated to him. It may be implied from circumstance, as when the first purchaser is in possession claiming the land. For the offer by the original grantor to sell land not in his possession, but which is in possession of another claiming it, is sufficient to rouse suspicions of an intended fraud, and to induce an inquiry of the possessor respecting his title.

In the application of these principles in the present case, it

is contended, by the plaintiff, that one of the judgment creditors of the grantor had express notice of the prior sale, because he had read the deed of conveyance, although for the purpose only of giving his opinion as to the form of it. It is certainly possible that a man requested to read a deed, to give an opinion whether it is well drawn, may overlook the description of the estate intended to be conveyed, and fix his attention only on the formal part of the deed; and a jury, from all the circumstances of the case, might infer this to be the fact. But as it is stated that he read the deed, we are bound to consider him as having knowledge of all the contents of the deed, not being at liberty, as a jury is, to make a different inference.

But it is said by the defendant, admitting the creditor once knew the contents of the deed by reading it two years before, that he had no reason to presume that the plaintiff's estate remained in him, as the deed had lain by unrecorded, and there had been no apparent change of possession or occupation. This observation appears to have weight. The creditor's debt was *bona fide*, and the lands of the grantor were liable to satisfy it. The grantee does not put his deed on record, and, for personal reasons, he permits the visible possession and occupation to remain in the grantor, and no reason is assigned why the deed is not recorded.

The words of the statute are that a deed not acknowledged and recorded shall not be valid in law to pass the estate, but against the grantor and his heirs. We are willing to construe the words liberally, to guard against fraud, but not to the injury of a second purchaser. If the grantee had entered into possession, the notice of the prior conveyance must have been considered as a continuing notice. But when the grantor remains in possession for a long time, during which the grantee might have recorded his deed, but does not do it, it would be unreasonable to defeat the subsequent title of a judgment creditor by imputing to him a fraud; because he might well presume, from the length of time that the deed had remained unrecorded, either that it was not *bona fide*, or that it had been canceled, or that the estate had been reconveyed; and if the first purchaser suffers, it is owing entirely to his own neglect.

When express notice of a conveyance, not accompanied or followed by a change of actual possession, is given to any person, and he shall soon after levy his execution upon the estate, as the property of the grantor, or take a second conveyance from him before the grantee has had a reasonable time to put his deed upon record, according to the usage of prudent pur-

chasers, who carry or send their deeds to the registry the first convenient opportunity, we are willing to relieve the first grantee against the rigor of the words of the statute, by imputing fraud to the second purchaser, but we cannot go further against the words of the statute to protect him from his own laches. If the grantee had taken visible possession of the estate before the levy or the second purchase, the case would rest on different principles, and would receive a different decision. It is, then, our opinion that the plaintiff must abide by the letter of the statute, and is not entitled to be relieved against it by any construction of the common law. Consequently, the verdict must be set aside, and a general verdict entered for the defendant, on which he may have judgment.

See a similar case, *Ludlow v. Gill*, 1 Am. Dec. 694.

PORTLAND BANK v. STACEY.

[4 MASS. 661.]

SALE OF VESSEL GOOD WITHOUT DELIVERY.—The sale of a vessel and cargo, abroad at the time, by a *bona fide* bill of sale, is valid against the vendor's creditors, provided the vendee takes possession thereof, without delay, upon the return of the vessel.

REPLEVIN for the schooner *Ann* and appurtenances, and also for a quantity of cotton and rice. A verdict was found for the plaintiffs and nominal damages assessed, subject to the opinion of this court upon the following statement: Joseph and Hugh McLellan being indebted to the plaintiffs in the sum of eighty thousand three hundred and thirty-four dollars and fifty cents, to secure the payment thereof, on the twenty-sixth December, 1807, by a bill of sale executed according to law, bargained and sold to plaintiffs, among other things, the schooner *Ann* with her appurtenances, and the cargo consisting of cotton and rice shipped on board on account of Joseph and Hugh. At the time of making the deed, the schooner was in Charleston, South Carolina, and had shipped the cotton and rice mentioned in the declaration. The schooner arrived at Gloucester, in the county of Essex, in January 4, 1808, and when her cargo was attached by defendants at the suit of *bona fide* creditors of Joseph and Hugh, having no knowledge of the conveyance to plaintiffs. As soon as the plaintiffs learned of the arrival of the schooner, they took possession of her and the cargo, without any negligence on their part, to wit: on the eighteenth of Janu-

ary, 1808. No other conveyance was executed, instrument made, or act done by Joseph and Hugh to transfer the property of the schooner and cargo to the plaintiffs, than the making of said bill of sale.

The cause was submitted without argument.

The solicitor-general and Prescott, for the plaintiffs.

Dexter and Jackson, for the defendants.

By Court, PARSONS, C. J. On the trial of the issues the question submitted to the jury was, whether the chattels replevied were the property of the plaintiffs. A verdict being found by consent of the parties for the plaintiffs, subject to the opinion of the court on a case stated, we have examined the facts agreed upon, and, upon consideration, are satisfied that the verdict is right. The property being in Joseph and Hugh McLellan, they mortgaged it by a deed in due form, duly executed, and for a valuable consideration, to the plaintiffs.

But it is objected that the goods, when the deed was executed, were in South Carolina, and that the plaintiffs did not, in fact, take possession of them, until after they had been attached at the suit of certain creditors of the McLellans.

Personal property passes by grant on the execution of the deed, and at common law an actual delivery is not necessary to the validity of the grant. By the English statute of 21 Jac., c. 19, which forms a part of their bankrupt system, a grant, where the possession is not delivered, but remains in the grantor, will not protect the property against the assignee of the grantor, if he become bankrupt. But the English bankrupt laws were never in force in this state. By the construction of that statute, a sale of a ship and cargo abroad is good, although possession be not immediately delivered, provided the evidence of the title be delivered, and the vendee take possession as soon as the property is within his reach. In this state, the neglect of delivery may be a circumstance from which a jury may, with other circumstances, presume fraud; but the sale is not thereby void. Now, the schooner, in this case, arrived at Gloucester on the fourth of January, 1808, and it is agreed that the plaintiffs took possession of her and her cargo as soon as they had knowledge of her arrival. Here was, therefore, no delay in the plaintiffs, nor any circumstance, from which it might be inferred that the sale was not *bona fide*. The mortgage must be deemed to have legally vested the property in the plaintiffs, and judgment is to be rendered on the verdict.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.*

STANTON v. WILLSON'S EXECUTORS.

[3 DAY, 37.]

OBLIGATION OF FATHER FOR SUPPORT OF CHILD.—Where an infant child escaped from its father through fear of personal violence and abuse, and could not safely live with him, the father was held liable for necessary support and education furnished to the child by a stranger.

SAME.—Where the wife had obtained alimony, in lieu of all claims of dower, and was made sole guardian of the children, it was held the father was liable for their support, furnished in the first place by her as guardian, and then by a stranger with whom she intermarried.

WHAT ARE NECESSARIES.—What articles are necessities must depend upon the circumstances of the party for whom they are furnished; and when these circumstances are ascertained, the court will only instruct the jury as to the classes of articles which are considered as necessities.

MOTION for a new trial. Action of book debt for education and support furnished to the children of the defendant's testator. The account produced in evidence contained charges to the amount of seven hundred and twenty-one dollars and eight cents, for the support and education of two children, William and Maria, and also one hundred and seventy-one dollars and thirty cents, for the support, etc., of a son John. It appeared that the plaintiff had married Bird, the testator, in 1789, and remained his lawful wife until divorced by a decree of the gen-

* The supreme court of errors was reorganized by statute in May, 1806. The superior court consisted of one chief judge and eight assistant judges, who were annually divided into three branches, the state being divided into three circuits, and one branch assigned to each circuit. The supreme court of errors consisted of all the judges of the superior court, and held a term once a year at Hartford and New Haven alternately. Strictly speaking, the court took cognizance only of writs of error from the superior court; but as all the judges of the superior court sat in the supreme court, an opportunity was thus afforded for hearing argument on motions for new trials, and cases stated. For the former organization of the court, see 2 Am. Dec. 48.

eral assembly in May, 1797. By that decree she was made sole guardian of the youngest children, William and Maria, during their minority; and Bird was ordered to pay her three thousand dollars, as her part and portion of his estate, and in lieu of all claims of dower, the receipt of which sum she afterwards acknowledged, and gave Bird a discharge in full. William and Maria lived with and under plaintiff's care, and the maintenance charged in the account was furnished by plaintiff until her intermarriage with Stanton in 1803, and by him thereafter. Of John Herman, the eldest son of Bird, plaintiff was not appointed guardian; but he continued to live with his father until 1803, when, through fear of personal violence, he ran away, and went to live with Stanton, who from that time furnished the support and tuition as stated in the account. It was agreed that the charges accrued without any request from Bird, and that he never made any express promises to pay them. The plaintiff was admitted to testify in support of the account, to which admission defendant objected; and on this ground, as well as on the charge to the jury that plaintiff was entitled to recover, the defendant's motion for a new trial was based.

N. Smith and Beers, in support of the motion, contended that the duty to support ceased when the rights of the guardian by nature were taken away; that by nature a mother was equally liable with the father to maintain their offspring: 1 Bl. Com. 447. That the act of giving so large a sum to the wife out of the husband's estate is strong presumptive evidence that the legislature intended it for the support of the children, as well of the wife; that from the face of the decree, it appears this sum was an allowance in lieu of dower, and dower is the provision made out of the husband's estate for the support of his widow and for the nurture and education of their children: Co. Litt. 30 b; 2 Bl. Com. 129, 130; Jacob's Dictionary, tit. Dower; that the charges for the support of the son John could not be recovered; and if any of them were recoverable, those for books, tuition and spending money at college certainly were not, as there is no law in England or Connecticut compelling a man of property to educate his children, and particularly at college: 1 Bl. Com. 450; 2 Swift's System, 205. Counsel further contended that the action of book debt would not lie, where the liability arose from operation of law; that plaintiff ought to have preferred her petition to a county court according to the statute of this state: Tit. 88, c. 1, or of Vermont, where the support was furnished. The admission of plaintiff to prove her account was

erroneous, as she was the lawful wife of Stanton at the time the accounts accrued; and such admission was against public policy: Peake's Evidence, 174; *Monroe v. Twisleton*, Id. 44.

Daggett and Gould, contra. The father's liability to maintain his children is a principle of natural law, and is established by the common law: 1 Bl. Com. 446, 448, 449; 1 Swift's Syst. 204; and the divorce in this case does not release the father from that liability, as a natural duty cannot be discharged by dissolving a civil relation. The appointment of the mother as guardian does not release the father, as a guardian is not bound to support, but is merely a trustee and committee of the person and estate of the ward: 1 Bl. Com. 460. A guardian may apply the property of the infant to his support: Com. Dig. tit. Chancery, 3, O. 2; but it is otherwise with regard to the father, except when he is in distressed circumstances: *Darley v. Darley*, 3 Atk. 399; *Hughes v. Hughes*, 1 Bro. C. C. 387; *Roach v. Garvan*, 1 Ves. 160, and a guardian may charge the articles furnished on book, and recover for them in an action at law: *Mills v. St. John*, 2 Root, 188. The allowance of alimony is no evidence of the release of the husband, for alimony is granted where there are no children. As to the advances made to the son John, the jury have determined what were necessary; and the father sent a credit with his son, when through cruelty he drove him away from home: 1 Pow. Con. 139; *Rawlyns v. Vandyke*, 3 Esp. 251; *Stone v. Carr*, Id. 1; *Hodges v. Hodges*, 1 Esp. 441. This is the proper form of action: *Mills v. St. John*, 2 Root, 188. Defendant has not shown in support of their objection that a petition should have been filed in the county court under the statute that this case is within the statute, nor that the statute furnished the only remedy. The obligation to support infant children is a common law duty enforced by an action at common law: 1 Bl. Com. 446, 448, 449; 1 Swift's Syst. 204; T. Raym. 500; *Simpson v. Robertson*, 1 Esp. 17; *Ford v. Fothergill*, 1 Id. 211; *Stone v. Carr*, 3 Id. 1. The plaintiff was properly admitted as a witness, she having no husband at the time she testified, and her testimony being in favor of, and not against him whom she represented.

By COURT. Parents are bound by law to maintain, protect and educate their legitimate children, during their infancy, or non-age. This duty rests on the father, and it is reasonable it should be so, as the personal estate of the wife, and in her possession at the time of the marriage, becomes the property of the

husband, and instantly vests in him. By the divorce the relation of husband and wife are destroyed; but not the relation between Bird and his children. His duty and liability as to them remained the same, except so far forth as he was incapacitated or discharged by the terms of the decree. This decree takes from him the guardianship of two of his children; and with it the right, which, as natural guardian, he might otherwise have exercised; and releases him from those duties only which a guardian, as such, is bound to perform. This transfer of the guardianship to the plaintiff vested her with powers similar to those of guardians in other cases, and the appointment of the plaintiff to this trust did not subject her to the maintenance of the children, her wards, any more than a stranger would have been subject by a like appointment. By accepting the trust, she became bound to provide for, protect and educate them at the expense of Bird, unless the decree of the general assembly has made other adequate provision, which, by the terms of that decree, she is bound to apply. This is not the case here. The sum allowed was directed to be paid her as her part and portion of Bird's estate, and in lieu of all claims of dower.

Articles furnished by a guardian for the necessary support, maintenance and education of his ward, or by others, at his request, are proper articles to be charged on book. Book debt is the proper action; and the party is, by statute, in this action, made a competent witness. What articles are to be considered as necessaries, must depend in some measure on the circumstances of the party for whom they are furnished. The court can only instruct the jury as to the classes of articles which, by law, are considered as necessaries; but the quantity, or extent to which they have been furnished, is a fact to be left to the jury, and to what amount they shall be allowed must depend on their discretion. It may be generally true, that minors under the government of parents cannot bind their parents for necessaries without their consent. The danger of encouraging children in idleness and disobedience, and of their being inveigled into expense by the artful and designing, furnishes a sufficient reason for the rule; but neither the rule nor the reasoning will apply to the charges in respect to two of the children in this case. The articles were furnished by the guardian herself, or at her request, who, in virtue of her trust, had full power to contract, and make the father liable for necessaries, not only without, but against his consent.

With respect to the charges on account of Herman's support, if it is admitted that "he eloped from his father for fear of personal violence and abuse, and could not, with safety, live with him," every reason for the rule that can be given ceased to operate. Protection and obedience are relative duties; and when the wisdom that should guide the infant is lost in delirium, and the arm that should protect, and the hand that should feed him is lifted for his destruction, obedience is no longer a duty, and the child cannot, with any propriety, be said to be under the government of a father. But because the father has abandoned his duty and trust, by putting the child out of his protection, he cannot thereby exonerate himself from its maintenance, education and support. The duty remains, and the law will enforce its performance, or there must be a failure of justice. The infant cast on the world must seek protection and safety wherever it can be found; and where, with more propriety, can it apply than to the next friend, nearest relative, and such as are most interested in its safety and happiness? The father having forced his child abroad to seek a sustenance under such circumstances, sends a credit along with him, and shall not be permitted to say it was furnished without his consent or against his will.

SMITH and BALDWIN, JJ., dissenting.

SWIFT, J., absent.

Motion denied.

In a well considered case, *Finch v. Finch*, 22 Conn. 411, this case came under consideration of the court. This was an action of book debt, like the principal case. The wife, on her petition, had been divorced from the defendant; the custody of the children was given her. In her prayer, she asked for the custody, control and education of the children, and for a provision for their support and education. The decree was granted, and the sum of twelve hundred and twenty-two dollars, was assigned her as alimony, which was paid. The authority of the principal case was relied on by the plaintiff, to show the defendant's liability for the support and education of the minor children. The counsel for the defendant thus distinguished the principal case: "This case differs materially from *Stanton v. Willson*, upon which the plaintiff relies. The prayer of the present plaintiff in the application for a divorce is unlike Mrs. Bird's application to the general assembly. The general assembly merely constituted Mrs. Bird 'sole guardian of her son and daughter.' The superior court decreed that the plaintiff have henceforth 'the custody, care and education of said children.' The general assembly resolved 'that John Bird should pay to said Eunice three thousand dollars as her part and portion of the estate of said John, and in lieu of all claims of dower.'" The decision of the court was that the defendant was not liable, two out of five judges dissenting. It must

be confessed that it is somewhat difficult to reconcile these two cases. The opinion of the majority, Church, C. J., does not go so far as to expressly overrule the case; but the doctrine laid down is not in harmony with that in the principal case. Schouler Dom. Rel. p. 322, considers that the authority of the principal case may be considered questionable. He says: "An award of children to the mother should be presumed to carry with it a transfer of parental duties, as well as of parental rights." Elsworth, J., giving the dissenting opinion in *Finch v. Finch*, says, regarding the case: "I see no occasion for reversing the decision of *Stanton v. Willson*, so well considered by a court of distinguished and unsurpassed ability, and which, so far as my knowledge extends, has ever been satisfactory to the judges and the profession."

RILEY v. RILEY.

[8 DAY, 74.]

FOREIGN ADMINISTRATOR.—Letters of administration granted under the authority of one state, are of no validity to give a right of action to the administrator in another state.

MOTION for a new trial. It appeared on the trial, in the superior court, that the plaintiff was a creditor in the estate of one Deming, deceased, of the state of New York, and claimed that the defendant, who had disposed of personal property belonging to the estate, should be held liable as an executor *de son tort*. The defendant alleged that he had been authorized to receive and dispose of the property in question, by the administrator duly appointed by a surrogate of New York, and offered the letters of administration in evidence. Plaintiff objected to the admission of these letters, on the ground that, having been granted in New York, they could be of no validity in this state, and could confer no authority to dispose of the deceased's effects. The letters were, however, admitted, and verdict returned for the defendant; whereupon plaintiff moved for a new trial, the question being reserved for the opinion of this court.

T. S. Williams, in support of the motion. In England, formerly, the king had a right to the goods of intestates: 9 Co. 38; 2 Bl. Com. 494; and now no notice is taken of a grant of administration in a foreign country: 11 Vin. Ab. 73, 76; Palm. 163; *Tourton v. Flower*, 3 P. Wms. 369; 11 Vin. 78; 2 Com. Dig. 256; 8 Ves. Jun. 44; nor of such grants in Ireland: 11 Vin. 76; Freem. 102; 2 Lev. 86. A grant of administration in England did not extend to the colonies of America: 2 Atk. 63; *Wright v. Null*, 1 H. Bl. 146, 154. The same principle has been recognized in Pennsylvania: *Graeme v. Harris*, 1 Dall. 456; in North

Carolina: 1 Hayw. 354; in Massachusetts: *The Selectmen of Boston v. Boylston*, 2 Mass. 384; in the courts of the United States: 1 Cranch, 268, 278, 282; and in the United States supreme court: *Dixon v. Ramsay*, 3 Cranch, 323. The existence of this rule in other states is a reason for adopting it there; otherwise, our citizens would be subject to the disadvantages of the rule in other states, and their citizens would derive the same benefit in this state as our own. No argument can be drawn from the convention of the four United Colonies in 1648 (2 Haz. Col. 124, 135), giving validity in this state to letters of administration granted in the other colonies; for that proposition was adopted on the condition that "the general courts of the other colonies yield their assent thereto," and such assent by the state of New York has not been shown. An administrator has been compared to the assignee of a bankrupt, who, it is said, can maintain an action in any other country; but see 1 H. Bl. 677; and 2 Johns. 344 [see *Bird v. Caritat*, post, 433], where Kent, C. J., said an assignee could not maintain an action in Great Britain, in his own name; creditors are not affected by the discharge of a bankrupt in another country: *Smith v. Buchanan*, 1 East. 11; *Van Raugh v. Van Arsdaln*, 3 Cai. 154 (2 Am. Dec. 259), and why should they be bound by the assignment?

Dunbar and J. Trumbull, for the defendant. The reason that in England the deceased could not be represented by an administrator deriving authority elsewhere, is that such administration would infringe upon the privileges of the ordinary or metropolitan. And it has been expressly decided in *Nicole v. Mumford*, Kirby, 270, that an administrator duly appointed in the state where deceased dwelt, may sue in this state to recover any property belonging to this estate. So, also, in *Woodhull v. Gleason and Cowles*, and such has been the practice here for a long course of years. The resemblance between an administrator and an assignee in bankruptcy, who may sue as such in a foreign country for debts due the bankrupt, *Le Chevalier v. Lynch*, Doug. 170, furnishes a further argument in support of this position. It is provided by the constitution of the United States, that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state: Art. 4, s. 1.

By COURT, unanimously. By the common law, the power and right of an administrator are given only by the court that

appoints him. The power of an executor is given by the will of the testator; but his right to appear in any court, and the validity of his acts in that capacity, depends wholly on the probate of the will by the prerogative court, within the limits of that local jurisdiction, in which he claims the power to act. In England, a will must be approved in every prerogative court, within the local limits of whose jurisdiction the testator died possessed of *bona notabilia*, in order to enable the executor to take possession of the goods. The courts of probate in Connecticut have, as to this point, a jurisdiction co-extensive with the limits of the state, and no more.

During the union of the four original colonies of New England, in 1648, it was proposed by the board of commissioners, that "if the last will and testament of any man be duly proved and certified from any one of the colonies, it shall be accepted and be allowed in the rest; that if any planter or inhabitant die intestate, administration be granted by the colony to which he belonged, and the administration shall be in force for the gathering in the estate in the rest of the colonies." This proposition was approved and confirmed by the statutes of those colonies, and continued to be law as long as those statutes remained in force. The statute of Connecticut was not repealed on the dissolution of the union, but was omitted in a subsequent revision of our laws. Still the practice has continued to allow, in our courts, the right of action to executors and administrators empowered by the courts of the neighboring states, and to consider all their acts in such capacity valid. This practice is not warranted by common law, or by any existing statute. It rests only on ancient custom; justified by convenience and reciprocity as long as the neighboring states allowed the same rights to executors and administrators, empowered by the prerogative courts of this state. The right is refused in the state of New York. It has recently been denied in the supreme judicial court of Massachusetts. [*Goodwin v. Jones, ante, 178.*]

New trial granted.

NICHOLS v. RUGGLES.

[8 Dax, 145.]

CONTRACT VOID AGAINST PUBLIC POLICY. — A contract to reprint any literary work, in violation of a right of copyright secured to a third person, is void, and the printer who executes such contract, knowing the rights of such third person, cannot recover for his services.

MOTION for a new trial. The plaintiff brought an action of book debt, charging the defendants, among other things, with two hundred and sixty-two dollars and nine cents, for printing part of a book entitled "The Federal Calculator." It was admitted, that prior to the printing for which the charges were made, one Hawley had obtained the exclusive copyright of the book, as author, throughout the United States; that he had lodged the title with the clerk of the district court of Connecticut, and had assigned his copyright to one Pennyman, with the exclusive privilege of printing and vending the book in this state. There was no evidence that Hawley had ever published, in any of the papers of the United States, that he had obtained the copyright, nor that he had ever deposited a copy of the book in the office of the secretary of state of the United States. It was contended for the plaintiff that he did not know of Pennyman's assignment of Hawley's copyright, prior to the printing; and that, though the printing was done in this state, it was with a view to sell the books only in New Jersey.

The presiding judge instructed the jury, that if the plaintiff did know of such copyright before the printing, the contract was illegal, and no recovery could be had for that charge. The jury found for the defendant, and the plaintiff moved for a new trial on the ground of misdirection. On this motion the case now came before the court.

Edwards and J. Law, in support of the motion, contended that to render the consideration of a contract illegal there must be something of an immoral nature in it; that in the printing in this case there was nothing *malum in se*; that the printing of a copyrighted book was not prohibited, but only visited with a penalty; that Hawley had failed to comply with the requisites of the statute, and could not claim the benefits thereof; that the mere printing was no violation, it being the intention of the parties to vend the books in New Jersey.

Gould and Hatch, for the defendants. An engagement to do that which is unlawful in itself does not bind: Pow. Con. 164; 1 Esp. Dig. 88; and an unlawful consideration will render a promise to do an indifferent act void: Pow. Con. 176; Buller's N. P. 206. It makes no difference whether the act be *malum in se*, or only *malum prohibitum*: Pow. Con. 165; *Ketchum v. Scribner*, 1 Root, 95. Contracts in fraud of third persons are void at law and in equity: *Parsons v. Thomson*, 1 Bl. Rep. 322; *Holland v. Palmer*, 1 B. & P. 95; *Willis v. Baldwin*, Doug. 433;

Jackson v. Duchaire, 3 T. R. 551; Pow. Con. 165, 176. Pennyman had an exclusive right to this book, both by the common law, *Millar v. Taylor*, 4 Burr. 2303; *Donaldsons v. Becket et al.*, Id. 2408; 2 Bl. Com. 411, and Christian's note, p. 576; and under the statute. The printing in this case, was at the same time a civil injury and a public offense, inasmuch as it incurred the forfeitures imposed by statute. The publishing in the newspaper, and the filing of a copy with the secretary are acts merely directory, and not in the nature of conditions precedent as the wording of the statute clearly proves. The bare act of printing is illegal as is implied by *Hudson v. Patten*, 1 Root, 133.

By COURT. A contract to reprint any literary work, the copyright to which has been secured to the author, is void, unless it is entered into with the consent of the author, or his assignee. And the printer who executes the contract with a knowledge of the rights of the author, can recover nothing for his labor.

The provisions of the statute which require the author to publish the title of his book in a newspaper, and to deliver a copy of the work itself to the secretary of state, are merely directory, and constitute no part of the essential requisites for securing the copyright. The publication in the newspaper is intended as legal notice of the rights secured to the author, but cannot be necessary where actual notice is brought home to the party, as in this case. The copy to be delivered to the secretary of state appears to be designed for public purposes, and has no connection with the copyright. Nor can the intent with which the work is reprinted be taken into consideration, as the act of reprinting is expressly prohibited by the statute. And as it appears in this case that the plaintiff reprinted the "Federal Calculator" after the copyright had been secured, and with actual notice of the fact, he could recover nothing on that account, and the charge of the court to the jury was correct.

SWIFT and SMITH, JJ., dissenting.

New trial denied.

The point decided in this case in reference to the copyright laws, having no application at the present time, we have disregarded. It was, however, overruled in the supreme court of the United States in *Wheaton v. Peters*, 8 Pet. 591.

HILLHOUSE v. CHESTER.

[3 DAY, 166.]

MAXIM SEISINA FACIT STIPITEM.—The maxim *seisina facit stipitem* has never been adopted in Connecticut, but on the death of the ancestor, the descent is cast upon the heir without any reference to the seisin of such ancestor.

CONSTRUCTION OF STATUTES.—When the legislature has used a term, without defining it, which has a well settled meaning in the common law, it must be supposed that they use it in the same sense.

ACTION of ejectment. Upon the general issue, the following facts appeared: James Hillhouse, being seised of the premises in question, died in 1740, leaving two sons, of whom the plaintiff is one, and a daughter Rachel. The premises were set off to her as her share of her father's estate. In 1753, she married Joseph Chester, and soon after the birth of a daughter, Mary, in 1754, died. Mary died in 1765, without issue, under the age of twelve years. Joseph Chester, on his marriage, became seised of the premises in right of his wife, and on the birth of Mary, as tenant by the curtesy. In January, 1801, he conveyed the premises to the defendant who on the death of Joseph Chester, in 1804, entered and remained in possession.

The plaintiff claimed as heir and next of kin of the blood of the ancestor from whom the estate came, but pursuant to the direction of the court, the jury found for the defendant. Plaintiff then moved for a new trial.

Daggett and W. Hillhouse, for the plaintiff, contended that Mary Chester, under whom defendant claimed, had not been seised of the premises, so that title could be derived from her; that the ancestor must have a seisin in deed: *Fleta*, l. 6, c. 2, s. 2; *Co. Litt.* 11, b. 15, a.; *H. H. C. L.*, c. 11; 2 *Bl. Com.* 209; and that the maxim, *seisina facit stipitem*, was decisive against the defendant's claim. They urged, further, that the words "next of kin" were used in the statute to mean "next of blood inheritable," and that the real estate was to descend to those only who were of the blood of the first purchaser: *Radcliffe's Case*, 3 *Rep.* 40; *Collingwood v. Pace*, 1 *Vent.* 415; 2 *Bl. Com.* 224; 1 *Inst.* 10, arguing that the expression should be understood as at common law: 6 *Mod* 143; 4 *Bac. Ab.* 647; and that the term "heirs" was applicable to those only who claimed by right of representation and of blood: 1 *Inst.* 7, 8, 12; 3 *New Ab.* 17, tit. Descent C, note a.

Goddard and Gurley, for the defendant, replied that the seisin of Mary had been constructive: *Goodtitle v. Newman*, 3

Wils. 516; that an infant may consider whoever enters upon his estate, as entering for his use: *Doe v. Keen*, 7 T. R. 386; that according to the statute of this state, there was no difference between actual and legal seisin, the right of possession giving a possession in law; that the term "next of kin" used in the statute of distributions, in force at the time of Mary's death, meant "nearest kindred," its literal signification; and that, there being no distinction made between real and personal property, it must have been the intention that parents should inherit before collateral kindred.

By COURT. The statute of distributions, which was in force in this state at the death of Rachel, places the real property of a person who died intestate upon the same footing as personal; that is to say, both kinds of estate were to be distributed to the same persons without any regard to the maxim, *seisina facit stipitem*. The claim, therefore, of the plaintiff to the land in question, on the ground that she was the person last actually seised, as next of kin to her, fails; for on Rachel's death, who left issue Mary Chester, her only child, the lands descended to said Mary, and she was, although a minor, legally seised of those lands as heir to her mother. This has always been the received opinion in this state, and the practice has been conformable thereto, that on the death of an ancestor the descent was cast upon his heir, without any reference to the actual seisin of said ancestor; and the right of such heir to the real property of the intestate was the same as his right to his personal property. The plaintiff cannot, therefore, inherit this estate as next of kin to Rachel. If he can inherit the estate in question it must be as next of kin to Mary Chester, his niece.

It cannot be pretended that the plaintiff is next of kin to Mary, if we give the same construction to the words which they have received in the English law. The rule of construction which has obtained in that law has been uniformly the same since their introduction into it. By the statute of Henry VIII, administration on the estate of an intestate is directed to be given to the next of kin. It has always been held, that to ascertain who this person is, the computation of kindred is to be made according to the rules of the civil law. So, too, the statute of distributions, enacted in the reign of Charles II, directs that if there is no issue of the intestate, his personal property shall be distributed to his next of kin. To ascertain who that person is, the computation is always made according to the rules of the civil law. Our statute, which directed that

in such an event the estate of the intestate, both real and personal, should go to the next of kin, was enacted at a time when the aforesaid statute of Charles II, and the construction given to it, was perfectly known. It is a sound rule, that, whenever our legislature use a term without defining it, which is well known in the English law, and there has a definite, appropriate meaning affixed to it, they must be supposed to use it in the sense in which it is understood in the English law. In the present case, the father of Mary was her next of kin, according to the computation of the civil law, being in the first degree, whilst the plaintiff was in the third degree. For the same reason that Mary's personal estate would have gone to her father by the English statute, both her personal and real would go to her father by our statute, for he is her next of kin; and there is no possibility of resisting this conclusion, unless the term "next of kin," when used in our statute, means to point out one person when real property is concerned, and a different person when personal property is concerned.

It is to be observed that there is no intimation in the statute that those terms are to be understood in two different senses. Both kinds of estate are directed to be distributed to the next of kin. There must be some very cogent reason to induce a belief that the legislature did not intend, in all cases, that both kinds of estate should go to the same persons. It is claimed that the term "next of kin" in our statute, as it respects real property, means the next of kin inheritable at common law. So that when there are no issue of the intestate living at the time of his death, we must resort to the English common law to discover who may inherit his real property, by which law the ascending line is excluded, and every person in the collateral line except the next collateral kinsman of the whole blood, who himself is of the blood of the first purchaser. Certain it is, that the statute intimates no such thing. But it is contended that this is the meaning of the terms, when real property is concerned. In the English law of descents, we never find these words so used standing alone, as in our statute. The rule in their law is, that on failure of issue of the person who died actually seised, his real estate shall go to his next collateral kinsman of the whole blood, who is of the blood of the first purchaser. It would be very strange that the words "next of kin" in our law should designate the character just described, when they would not designate such person in their law. Where A. devised a real estate to B., his daughter, for

life, with remainder over in fee to his next of kin, without other words or explanation, it was determined that on the death of B. this estate should go to the next of kin, computing kindred according to the rule of the civil law, and not to the next collateral kinsman of the whole blood, etc.

If the legislature of this state had discovered an anxiety in other respects to preserve entire the rules of descent established by the common law, it might have furnished some ground for a conjecture in favor of the plaintiff's claim; but that is not the case. Instead of respecting the English law of descents, they have provided, that there shall be no preference given to males; that females shall inherit equally with them; and, also, that there shall be no preference given to the eldest male. If then a man dies intestate, instead of the real property descending to the eldest son, to the exclusion of his brothers and sisters, it descends equally to all his children, whether male or female. The object of our statute is to distribute the estate of an intestate person equally among all those who are in the same degree of relationship; and this object would be defeated, if such construction should be given to the term next of kin as is contended for by the plaintiff. For if we consider the term as meaning such next of kin only as are inheritable at common law, then no person can inherit to the intestate, except the eldest male, however many persons there may be in the same degree of kindred according to the computation of the civil law. It must be the next collateral kinsman to the intestate of the blood of the first purchaser, for he alone, as the next of kin, is inheritable according to the English law of descents. To adopt this rule, we must give a construction to the terms next of kin, which they have never received before; and this is to be done in opposition to the manifest intention of the legislature, who enacted the statute. It is opposed to the received opinions among lawyers, and all the modern decisions in this state.

New trial denied.

Kent, 4 Com. 388, points out the states which have abolished the English maxim, *seisina facit stipitem*. In a note he shows that the doctrine of the common law was fully, ably and learnedly discussed in this case.

BIRD v. CLARK.

[3 DAY, 272.]

TORT NOT ASSIGNABLE IN BANKRUPTCY.—A right of action founded on a tort does not pass to the assignee, so that he can sue upon it in his own name, by an assignment under the bankrupt act of 1800.

RIGHT TO MAINTAIN TRESPASS OR TROVER.—The property of personal chattels draws to it the possession, so that the owner, although not in actual possession, may bring either trespass or trover, at his election, against a stranger who takes them away.

MOTION for a new trial. The plaintiffs brought an action of trespass against the defendant, declaring that one Miller, being indebted to plaintiffs in a large sum of money, assigned to them, as security therefor, the ship *Ocean*, by an instrument in the nature of a bottomry bond, granting them the exclusive right to her during a voyage from New York to New London, and thence to London; that plaintiffs received the ship, put on board a master, expended money in repairs, and proceeded with her to New London, where the defendant and Hempstead seized her and delayed her thirty days, to plaintiffs' damage, etc. Hempstead, one of the original defendants, died since the commencement of the suit. The cause had been twice tried, and during the second trial defendants offered to prove that since the first trial, Robert Bird, one of the plaintiffs, had become bankrupt and had assigned his effects under a commission of bankruptcy duly issued in New York. This evidence was rejected. In the progress of that trial, it appeared that the plaintiffs, to regain possession of the ship which had been attached as the property of Miller, by Hempstead, at the suit of defendant Clark, prayed out a writ of replevin in the name of Miller, and procured sureties upon the bond of replevin, giving to these sureties bonds of indemnity. They now offered in evidence the writ of replevin and the bond, together with a writ, process and judgment in favor of Clark against Miller and his sureties; and offered to prove that they had indemnified the sureties. This evidence was admitted over defendant's objection.

In the charge to the jury, the court did not instruct them that said evidence was not to be considered as proof of special damage in the case, but instructed them that the right of the plaintiffs to recover depended on the right of property. Verdict was found for the plaintiffs; and the defendant moved for a new trial on the ground that the rulings of the court in regard to the evidence were erroneous, and of misdirection to the jury.

Goodrich and Dana, in support of the motion.

Daggett and Goddard, against it.

By COURT. The first question arising in this case is, whether the bankruptcy of one of the plaintiffs, and the assignment of his estate under a commission of bankruptcy, divested them of their right of action. By the act establishing a uniform system of bankruptcy, it is provided, "That the commissioners shall take into their possession all the estate, real and personal, of every nature and description, to which the bankrupt may be entitled; and that they shall assign it to such persons as the creditors shall choose their assignees." This was a right of action founded on a tort, and did not pass by such assignment to the assignees. They could not maintain in their own names for such injury done to the estate of the bankrupt. The plaintiffs, therefore, were not divested of their right of action.

The material question in this is, whether it was competent for the plaintiffs to give in evidence the proceedings in the replevin, and that they indemnified the sureties in the bond, for the purpose of showing that they became liable to the defendant for the amount of his claim against Miller, and that this sum ought to be the rule of damages.

It is a clear principle, that if one man wrongfully and by force take from another man his property, and compel him to pay money to regain it, trespass will lie for the wrongful act of taking the property. By a parity of principle, if he compel him to give security for money, action for trespass will lie. If one may procure the estate of another to be wrongfully attached, as the property of a third person, and the owner, to regain it, pay or satisfy the claim for which it is attached, trespass will lie. The case of *Shipwick v. Blanchard*, 6 T. R. 298, supports this doctrine. The defendant, as assignee of bankrupt, ordered the goods of the plaintiff to be seized and distrained for rent due to the bankrupt. The plaintiff, to redeem the goods, paid the sum claimed for the rent and expenses; but the petitioning creditor's debt having accrued after the act of bankruptcy, the commission of bankruptcy was void, and the plaintiff brought an action of trover for the goods, which was held to lie. It is true that the question made was, whether trover would lie, and it was taken for granted that the defendant was liable for such wrongful distress. If trover would lie, it clearly follows that trespass would also lie. In England, a distress for rent is in the nature of a legal process; and if tres-

pass will lie for goods redeemed from a wrongful distress, it will for goods redeemed from a wrongful attachment. Hence it follows, that if, in the case under consideration, the plaintiffs had paid the money, or given security to the defendant for his debt against Miller, for which the vessel was attached, in order to regain possession of it, they could have maintained trover or trespass against him for such wrongful attachment. The procuring of the bond on the replevin, and the indemnifying of the sureties by the plaintiffs, was, in effect, giving security to the defendant for the debt due to him from Miller; for they became liable to pay it. It was, therefore, the same thing in judgment of law, as if they had paid him the money.

It is said that the plaintiffs are estopped by the averments in the replevin from saying that this vessel was not the property of Miller; that these facts ought not to be given in evidence as a basis for the recovery of damages; and that it is improper and dangerous to permit the action of replevin to be used for such purposes. In the writ of replevin there is no acknowledgment by the plaintiffs that the property of the vessel was in Miller. They are not parties to the record. The only act done by them is to procure the bond on the writ, and indemnify the bondsmen; and this cannot estop them from saying the vessel was their property, any more than if Miller had procured the vessel to have been replevied without their knowledge. In all cases where money is paid to redeem goods wrongfully taken, attached, or distrained, it is competent for the party to prove that the money was paid to redeem the goods from a wrongful taking; and that it was not a voluntary payment of an acknowledged claim.

There is no more impropriety, or inconsistency, in admitting the plaintiffs in this case to show that the proceedings in replevin were for the purpose of redeeming property wrongfully attached, than there is to admit a party to prove the payment of money, or the giving of a note for that purpose. Nor does it appear that any inconvenience can result from such practice. Where the title to goods is contested, and they are attached for the debt of one, and claimed to be the property of another, there is no legal process by which such claimant can regain possession; for replevin can be maintained only in the name of the defendant in the suit. The only legal remedy, in the name of the owner, is by an action of trespass, or trover; which leaves the property in the possession of the officer attaching it, and it may be held in the custody of the law, till the final trial

of the suit on which it is attached. But, if it is permitted that the claimant (where the defendant in the suit on which the goods are attached consents) may, by replevin in his name, regain the goods, all the damage that arises from the detention is avoided. No case can exhibit this advantage in a more striking manner than that under consideration. Clark, to secure a debt of ten thousand dollars, due from Miller, attached a vessel and cargo ready to sail, worth thirty thousand dollars, which was the property of Bird, Savage and Company. If this vessel had not been replevied by them, in the name of Miller, then Clark would have been liable for the value of the property, as well as damages for defeating the voyage; but by admitting the replevin, he will recover on the replevin bond the whole sum recovered against him in this action; so that he can try the question, whether the property of the vessel was in Miller, without any expense, save that of the cost of trial. For the proceedings in replevin are not admitted as a basis on which to recover damages, but to limit the extent, where the value of the property is more than the amount of the debt for which it is attached. But, if the value of the property be less than the debt demanded, then the defendant will be entitled to recover the value only; and the replevin is given in evidence merely for the purpose of showing that the plaintiff has regained his property in such manner, as does not excuse the defendant from the injury done him by the wrongful attachment.

If the plaintiffs, instead of replevying the vessel, had given a receipt to the officer, with an engagement to have it forthcoming on the execution when demanded, and then had taken possession again, it is evident, that in an action of trespass for taking the vessel, they might have proved this fact, in order to show that they did not regain their property in such manner as to excuse the defendant from the trespass. There can be no difference in principle, between the proceeding to regain one's property, and the process by replevin.

Another ground of the present motion is that the court directed the jury that it was a question of property only. The defendant urged that the plaintiffs had only a mortgaged right to the vessel, and was not in actual possession; and, therefore, if he had the property, he could not maintain trespass, but trover only, on the principle laid down by Lord Kenyon in *Ward v. Macauley*, 4 T. R. 489, that trespass is founded on possession, and trover on property; that where the plaintiff has not the possession, he cannot maintain trespass, but must bring

trover. But Lord Kenyon afterwards retracted this doctrine in *Gordon v. Harper*, 7 T. R. 9. The true principle is laid down by Williams in his note to Saunders's reports: Note 1 to *Wilbraham v. Snow*, 2 Wms. Saund. 47, a. In order to maintain trover it is necessary that the plaintiff should have either a special or absolute property in the goods which are the subject of the action. He who has the absolute or general property may support this action, though he had never had the actual possession; for it is a rule of law that the property of personal chattels draws to it the possession, so that the owner may bring either trespass or trover, at his election, against a stranger who takes them away. It appears that the ship in question, for a valuable consideration, was assigned by Miller to the plaintiffs, by an instrument in the nature of a bottomry bond, granting them exclusive right to her during a voyage from New York to New London, and thence to London. The plaintiffs had a right of possession if they had a right of property; and, of course, their right to recover depended on the question of property.

New trial denied.

KILBOURN v. BRADLEY.

[8 DAY, 356.]

MORAL OBLIGATION, WHEN A CONSIDERATION.—If a usurious security be given up, and a new security taken for the sum advanced and legal interest, the latter security will be good; for the borrower's moral obligation to pay the principal and legal interest, is a sufficient consideration therefor.

ACTION of ejectment. The defendant claimed under one Aaron Bradley, by whom the premises had been mortgaged to the plaintiff as security for the payment of a promissory note for one thousand six hundred and sixteen dollars and seventy-five cents and interest. It appeared that Aaron and Jacob Bradley were the indorsers of a note payable to Kilbourn, wherein more than legal interest had been reserved; that after several payments on that note by the maker, Bishop, he failed, leaving one thousand and five hundred dollars still due, to secure which, Aaron Bradley gave his note for that sum and interest. Bradley being unable to pay this note when requested, agreed with plaintiff to give a new note for the amount of principal and interest of his former note, and to secure the same by a mortgage of the premises in question, which was done.

The jury returned a verdict for the plaintiff, and the defend

ant thereupon moved for a new trial, on which motion the case came before the court.

Daggett and N. Smith, for the defendant, contended that a new security substituted for one originally usurious, was void: *Tate v. Wellings*, 3 T. R. 537; *Walton v. Shelly*, 1 Id. 296; *Cuthbert et al. v. Haley*, 8 Id. 390. The consideration of the second note was money due on a former contract to pay more than lawful interest, and must make this note usurious: *Barnes et al. v. Headley et al.*, 1 Campb. Cas. 157; 1 Pow. Con. 176. A claim originating in an illegal transaction cannot be supported: *Steers v. Lashley*, 6 T. R. 61; *Booth v. Hodgson*, Id. 405; *Mitchell v. Cockburn*, 2 H. Bl. 379; *Ex parte Mather*, 3 Ves. Jr. 473; *Aubert v. Mase*, 2 P. & B. 371.

Terry, for the plaintiff, insisted that the second note was valid, the consideration being the moral obligation Bradley was under to pay the money; that the usury had been expunged from the original contract, and that this note could not be considered a continuation of that contract: *Wright v. Wheeler*, 1 Campb. 165, *in notis*.

By COURT. The statute against usury, on principles of public policy, renders void contracts upon usurious consideration. But the lender incurs no penalty, unless he actually takes usury; and courts of equity, on relieving against oppression or extortion, order the repayment of the sum really loaned, or due, with the lawful interest. The moral obligation of the borrower to repay the principal sum actually loaned, with the lawful interest, is unimpaired. If the lender will expunge the usury, and the borrower voluntarily assents to repay the sum loaned with lawful interest, it is an act of justice forbidden by no principle of public policy, and which constitutes a good consideration for a new contract.

New trial denied.

The authority of this case was recognized in *Cook v. Bradley*, 7 Conn. 65; *Welch v. Wadsworth*, 30 Id. 157.

HARTFORD BANK v. HART.

[3 DAY, 491.]

DEPOSIT OF LETTER IN POST-OFFICE NOTICE TO PARTY.—Depositing a letter in the post-office is a fact from which the jury may infer that the person to whom it was addressed had notice of its contents.

ADMISSIONS OF MEMBERS OF A CORPORATION.—The admissions of individual members of a corporation, a party to the action, and which were not made in the exercise of any corporate duty, cannot be received in evidence.

ACTION against the defendant as indorser of a promissory note executed by one Joseph Hart, and general issue pleaded. The defendant set up as a defense that the indorsement was a forgery; the plaintiffs admitted that it was not the handwriting of the defendant, but contended that he had virtually authorized it, and made it his own.

Daggett, Perkins, Mosely, and Root, for the plaintiffs.

Ingersoll, Goodrich, R. Griswold, and N. Terry, for the defendant.

The defendant objected to one of the jurors on the ground that he had married the sister of one W., plaintiff in another action against the defendant, before this court, to be tried this term, and depending upon the same principles as this case. Plaintiffs insisted that this was not sufficient ground of challenge; especially as the sister was then deceased.

SWIFT, J., said it had never been determined in this state how far consanguinity, or connection by marriage, would disqualify a juror. The courts have decided, however, that the cousin of a party cannot sit in the case. The court excused the juror.

On the trial plaintiffs' counsel stated that Joseph Hart had made use of defendant's name on other notes which had been discounted at the bank, and that notice of this had been given to defendant. To establish the fact of notice, they offered to prove by the cashier, that he had put letters addressed to the defendant, containing notice, into the post-office.

Goodrich, objected to the evidence offered, contending that the putting a package into the post-office was no notice of its delivery; that a letter might be miscarried, and it would be impossible for a party to prove he had not received it. In the case of negotiable instruments, putting a letter in the post-office is sufficient, not because that proves notice, but because the party, in doing so, has discharged his duty; should the letter miscarry it would not effect him: *Chitty*, 95.

Daggett, contra. The objections made go to the weight, not to the competency, of the testimony offered; information is regularly communicated by letters through the post-office.

The court admitted the testimony.

SWIFT, J., said: It was perfectly clear to his mind that the putting a letter into the post-office is a fact from which the jury may infer notice.

Ingersoll, afterwards offered to prove that the names of other persons than the defendant had been forged by Joseph Hart, on paper which had been lodged at the bank, and had lain over; and that notice had been put into the post-offices directed to them.

The court ruled out the evidence. They said the point had been before determined.

During the trial defendant offered to prove by the admissions of the president and directors of the bank, that when they discounted the note, they knew that the indorsement was forged; and insisted that such admissions were respecting acts within the agency, and made by agents of the corporation.

Daggett, contra, urged that a corporation can regularly do no act without writing, 4 Com. Dig. tit. Franchises, F. 13; Harg. Co. Litt. 94, b. (n) 99; 1 Bl. Com, 475; 6 Vin. Ab. 268, 287, 288; Kyd. on Cor. 1, 256, 268, 449, 450; that the president is agent for certain purpose, but not to confess.

By COURT. It is clear that the doings of a corporation can be known only by its corporate acts. The confessions of individual members cannot be received. Though the directors have certain powers, resulting from their act of incorporation, and are, for certain purposes, agents; and though their acts, when in strict relation to their agency, are binding on the corporation; yet, as to the matters attempted to be proved, it does not appear that they were agents.

The evidence is, therefore, inadmissible.

This case was cited on the second point as to the evidence of individual corporators in *Fairfield v. Torpe*, 13 Conn. 181; *Southington Society v. Gridley*, 20 Id. 204, and in New York in *Osgood v. Manhattan Bank*, 3 Cow. 263.

CASES
IN THE
SUPREME COURT AND COURT OF ERRORS
OF
NEW YORK.

LUDLOW v. BOWNE.

[1 JOHNSON, 1.]

WARRANTY OF OWNERSHIP.—A policy of insurance was effected on goods from New York to France, warranted as American property. The goods were purchased and shipped in an American vessel, by American merchants to French merchants, under an agreement that the former were to deliver the goods at St. Vallery, for which they were to be allowed a certain commission, taking on themselves all risks; the consignees were to pay the freight on delivery, and also for the amount of cargo, in bills on London, guaranteed by a commercial house in that city. During the voyage, the goods were captured by the British, and condemned as French property. It was held that the property of the goods remained in the consignors until delivery in France, and that the warranty in the policy was not broken, in regard to the neutral character of the property, so as to vitiate the policy.

ACTION on a policy of insurance on the cargo of the ship *Sisters*, at and from New York to Havre de Grace. A verdict was found for the plaintiffs as for a total loss, subject to the opinion of this court, upon the following statement: On the twenty-eighth of June, 1793, the defendants subscribed the policy for three hundred pounds, at a premium of three and one-half per cent., the vessel and the cargo being both warranted American property. The ship sailed on the voyage insured on the nineteenth of July following, and was afterwards captured, during her voyage, by a British cruiser, and condemned in the British admiralty court as French property. Of the goods insured, three hundred and two barrels of ashes were consigned to M. M. Poulhain & Co., and the residue to Messrs. Morgan & Son, merchants, at Havre de Grace. The goods were purchased by the plaintiffs in New York, and shipped by them under an

agreement, the terms of which appear from the following letter from one of the plaintiffs:

"LONDON, May 11, 1792.

"M. Francois Poulhain: By the post to-day, I received yours of the fourth instant directing me to purchase three hundred barrels ashes and some oil, on certain conditions mentioned to Messrs. Michault. That we may perfectly understand each other, they were, viz., a commission of two and one-half per cent. on the amount of invoice, and additional commission of three per cent. on do. for the war risk. It is not understood that I am to assume the usual sea risk, but, for my security, I ought to make the insurance, in order to prove the property mine in case of capture; this will be two and one-half per cent. I must pay to have it done; so that, taking on myself all risks, and delivering you the goods at St. Vallery, save that of the freight, which you must pay, you must allow me eight per cent. on the amount of invoice; my bills are to be paid sixty days after the vessel's arrival at St. Vallery, in London, the exchange fixed at par, say one hundred pounds sterling for one hundred and seventy-seven pounds fifteen shillings and seven pence New York currency, with the guaranty of Messrs. Thelusson for the payment. These are the terms mentioned to Messrs. Michault, and on which I am willing to execute your orders. You will please send to Mons. Blandel a copy of this direction. When I receive your answer, I will write to my house, and you may depend on my attention, and the ashes shipped in season. D. Ludlow."

At the time of the shipment of the ashes, the plaintiffs possessed funds of Morgan & Son, which were afterwards remitted to them; but they held no funds of Poulhain & Co. The amount of the goods was charged to those persons respectively in plaintiffs' books. It was admitted that the war between France and Great Britain commenced on the first February, 1793. The questions arising from these facts were argued by:

Harison and Hoffman, for the plaintiffs.

Pendleton and Radcliff, for the defendants.

By Court, TOMPKINS, J. Two questions are presented by this case: 1. Whether the property in the goods insured and shipped under the contract stated belonged, during the transportation, to the plaintiffs, or to the consignees at St. Vallery? 2. Whether the contract be valid, according to the established principles of the law of nations?

1. The goods in question were purchased by the plaintiffs with their own funds, and upon their own credit, and it is not controverted, but that they vested in the plaintiffs, on the delivery to them by the persons of whom they were purchased. There was no privity between the French merchants and the original vendors; nor could the former be responsible to the latter for the price agreed to be paid for them. That this property was not divested by the subsequent delivery of the goods to the captain will be evident, if we attend to the terms of the contract under which they were shipped. The goods, after their arrival at the port of destination, were not, at all events, to go into the possession of the consignees. The French merchants were not entitled to receive the goods until they had performed the precedent conditions, as to the payment stipulated in the agreement. If they had never arrived at St. Valery, the Messrs. Ludlow could not have resorted to the French merchants, according to the terms of the contract, for the stipulated price; on the other hand, had the latter failed to perform the conditions on which the goods were to be delivered, they never could have compelled the plaintiffs to deliver them. Had a loss happened by the perils of the sea, and the insurers become insolvent; had the goods been destroyed by accident in the warehouse before they were laden; had the consignees refused to pay freight; had the failure of Messrs. Thelusson & Co. put it out of the power of the consignees to obtain the stipulated security; or had the vessel, by stress of weather, been driven into a different port, and there terminated her voyage, the cargo would have continued in the plaintiffs, and the loss or profit, in either event, would have remained to them. Indeed, it seemed to be conceded by one of the defendants' counsel, on the argument, that the legal ownership of the goods was in the plaintiffs; and the ground of defense was confined to the objection, that this contract was a mere cover, and fraudulent and void, as it respected belligerents. Fraud ought not to be presumed; and unless the agreement itself purports fraud, or is one forbidden by the acknowledged principles of the law of nations, the plaintiffs in this case ought to recover.

2. It cannot be denied that a neutral may, without contravening any established principle of the law of nations, carry on commerce with either of the belligerent parties, in the same manner, and to the same extent, as in time of peace, except in articles contraband of war, or to a blockaded port. The decisions in the court of admiralty in England, so much relied on

by the defendants, have not proceeded on the notion that a neutral cannot, *flagrante bello*, contract to sell and consign his own goods to a belligerent, for a stipulated profit, to be paid on delivery. The determinations which have been made on contracts, somewhat similar to the present, are supported by a rule of evidence peculiar to those courts; a *presumptio juris et de jure*, by which such contracts are determined to be fraudulent and collusive, and made for the purpose of covering the property of an enemy. They have considered the capture as equivalent to a delivery to the belligerent to whom it is consigned, and to whom it is thus presumed to belong. Without arraigning those decisions, it is sufficient, in the present case, to say that such an arbitrary rule of evidence is not to be resorted to here, and that the contract in question does not afford that presumption; on the contrary, its provisions are of a nature to exclude every reasonable influence of fraud, and to evince the neutrality of the property. The checks interposed, which might prevent its ultimate delivery to the consignees at St. Vallery; the security to be given, and the conditions to be performed, in order to entitle the latter to receive the goods, and the assumption of all risks by the consignors until the delivery of the property, are satisfactory evidence, to my mind, that the contract was *bona fide*, and that, in the contemplation of the parties, the ownership and the control of the property was to continue in the plaintiffs, who retained the right wholly to refuse the delivery of the goods in case the consignees should fail to perform the conditions previously stipulated. For these reasons, I am of opinion that the plaintiffs have complied with their warranty, and that they ought to recover the amount insured by the defendants.

SPENCER, J. By the contract entered into between the plaintiffs and the French merchants, the property in the ashes, insured and warranted to be American, remained in the plaintiffs until its delivery to the French houses at St. Vallery. The delivery could not be insisted on until bills for the amount on London, payable in sixty days after the arrival of the goods at St. Vallery, with the guaranty of the Messrs. Thelusson, had been furnished by the consignees to the plaintiffs.

The goods having been captured and condemned on their way to St. Vallery, there can be no pretense to say that the property, at the time of capture, did not exclusively belong to the plaintiffs. The defendants' counsel did not controvert the proposition that by the rules of law, as between the plaintiffs and the

French merchants, the property never had been transferred from the plaintiffs. But it was insisted that there was an equitable interest, by virtue of the contract, vested in the consignees, which, from a state of war between France and England, justly exposed the property to capture, and that by the law of nations, property so circumstanced was liable to capture and condemnation, on the ground of its being fraudulently covered with an intent to evade capture, and to supply a belligerent. These two propositions remain to be examined:

1. It is difficult to perceive in what manner the French merchants had acquired a vested equitable interest in these goods. The contract was in its nature executory; and no part of the price had been paid; they had an expectation of receiving them, but on no legal principles were they clothed with the rights of a *cestui que trust*. It has been fancifully said that because the goods were consigned to them, the capture by the English is to be deemed a delivery to the consignees. In the view of a court of admiralty, this may be so; but most certainly, if the Frenchmen were amenable to our own laws, the plaintiffs could never recover of them the price of the goods under that notion. Nothing but an actual delivery, or offer to deliver, would render them responsible upon the contract.

2. The goods in question not being contraband, within the utmost latitude to which that list has been swelled, were a lawful subject of commercial adventure by a neutral in time of war. The warranty that it was neutral has been verified. This warranty cannot be extended so far as that the property shall be regarded neutral by belligerents, but only that it is truly so, according to the code of the law of nations.

The cases decided by Sir William Scott do not bear an analogy to the present. In this, the property was not absolutely to vest in the French houses on its arrival at St. Vallery, certain acts were to be done on their part, as conditions precedent, as the drawing of the bills on London, with a guaranty for the amount of the cargo. These acts were contingent, and might never be performed.

It appears to me that the English courts of admiralty, on questions bearing a resemblance to the present, are governed more by ideas of political expediency, and of the necessity of destroying any commerce with their enemy, than by the law of nations. The high court of admiralty in England probably regarded this shipment as a fraud on belligerents, in attempting to evade capture and condemnation; but I do not feel myself

bound by their precedents, nor required to justify their solicitude to condemn, from motives of policy.

By the law of nations, a neutral has a right, with the exceptions of contraband goods, and going to a blockaded port, to supply the belligerents. This right, enforced by considerations of justice, as it regards neutrals, is not to be frittered away, by inquiring whether a belligerent has, by one mode of supply, or another, a prospect of greater mercantile advantage. The true inquiry is, is the property of a muniment of war within the list of contraband, and does it belong to an enemy, or a friend? Thinking, as I do, that the warranty in this case has been fulfilled, and that, at the time of the capture, the goods belonged to the plaintiffs, I must say that they are entitled to judgment.

THOMPSON, J. The questions presented by this case are: 1. To whom must the right of property in the shipment be deemed vested at the time of capture? 2. As to the legality of the contract made between the plaintiffs and the French merchants.

1. The subject insured consisted of pot and pearl-ashes, warranted American property. The shipment was made under an agreement, and upon the terms stated in the letter of Daniel Ludlow, of the eleventh of May, 1792, contained in the case, and to which we must resort, in order to ascertain the rights of contracting parties; and in doing this, the contract must be construed, without reference either to a state of peace or war; that point will come under consideration in the examination of its legality.

According to my understanding of the agreement, without entering into a minute detail of its several parts, the fair and obvious import of it is, that the plaintiffs stipulate to take all risks, of every description whatever, upon themselves, and to deliver to certain French merchants, at St. Vallery, in France, a quantity of goods, upon certain conditions to be performed on their part. These conditions were, that they should pay the plaintiffs the amount of the invoice price, with the addition of eight per cent. on such amount, the payment to be made in London, sixty days after the vessel's arrival at St. Vallery, and the guarantee of Messrs. Thelusson to be given for such payment, the French merchants also paying the freight. Though the case states generally, that the cargo was consigned to the French merchants, yet it is to be observed, that the contract contains no stipulation, that they were to be the consignees. This consignment must, therefore, be open to explanation,

whether made to them on their own account and risk, or on account and risk of the consignors. Here, then, arises the question: Where a shipment is made, under such circumstances, in whom must the property be deemed vested, until its arrival? I think, clearly in the plaintiffs. I cannot consider the plaintiffs as acting in the character of mere agents. Part of the allowance to be made to them is, to be sure, classed under the denomination of commissions, which, in mercantile language, may generally be considered as a compensation for the services of agents or factors; yet this circumstance, of itself, is not sufficient to restrict them to that character, when, from the general scope and nature of the transaction, they are represented as principals. The plaintiffs, having funds in their hands belonging to one of the French houses, could not, in any manner, qualify their character. These funds were not to be applied to the purchase of, or as payment for, this cargo.

By the contract, payment was to be made in London; besides these funds have since been remitted; at what particular time, however, does not appear. The plaintiffs, then, must be viewed in the capacity of vendors, making a contract with respect to this shipment, which was to be consummated in France; and the most that can be said is, that they had secured a market on its arrival there. The argument most urged, on the part of the underwriters, is, that this cargo went consigned to the French merchants, which, it is said, vested in them the right of property. I do not think it necessary to controvert the general proposition, that when goods are shipped on account of, and consigned to a foreign merchant, the property shall *prima facie*, be deemed vested in the consignee, subject to the right of stopping in *transitu* in case of insolvency. In such cases, probably, the master of the ship ought to be considered as the agent of the consignee, and a delivery to the former as equivalent to a delivery to the latter; neither can it be denied that where the consignment is for account of the consignor, the property remains vested in him, and he is deemed the legal owner: *Evans v. Martell*, 12 Mod. 156. The consignment is always subject to be controlled and explained, according to the understanding and evident intention of the parties: *Hibbert v. Carter*, 1 T. R. 748. So that, admitting it to have been general to the French merchants, if it be manifest that it was not the intention of the parties to vest in the consignees the right of property, such must be considered as the legal operation of the consignment. That it was the intention of the parties that the property should

remain vested in the plaintiffs, cannot, it appears to me, admit of a doubt; otherwise, the consignment is at war with the contract and the whole tenor of the transaction.

Whatever may be the general rules of law, and the ordinary course of commerce applicable to any given class of cases, there can be no doubt that these general rules may be varied and modified, by special agreement: 3 P. Wms. 186; *Godfrey v. Furzo*, 1 T. R. 748. This was admitted in its fullest extent, by Sir William Scott, in the case of the packet *DeBilboa*, 2 Rob. R. 133. The vesting of property, says Lord Mansfield, may differ, according to the circumstances of cases: *Davis v. Tames*, 5 Burr. 2680. The general rule of law is, that, as between vendor and vendee, the property is not altered until the delivery of the goods: *Snee v. Prescott*, 1 Atk. 245; *Mason v. Lickbarrow*, 1 H. Bl. Rep. 35; *Ellis v. Hunt*, 3 T. R. 469.

A distinction is, sometimes, made between an actual delivery to the vendee himself and a constructive delivery to some intermediate person. In the latter case, when the goods are at the risk of the vendee, it is equivalent to an actual delivery: 3 T. R. 469. Every legal contract may, however, be modified according to the will of the contracting parties; and, when special, it is to that we must look, in order to ascertain their rights. It cannot, I think, be denied that, in the present case, it was obviously the intention of the parties that the entire dominion and control over this property should remain in the plaintiffs until its arrival in France. The insurance was to be made by them, and for their own benefit. The property was, by the terms of the contract, expressly at their risk. If lost, the loss would have fallen on them; or if the underwriters had become insolvent, the loss would have been theirs. And Sir William Scott observes that this is the true criterion of property. He is to be deemed the proprietor, on whom the loss would fall, in case of accident: 2 Rob. Adm. R. 135. This is certainly a just and rational criterion between the vendor and vendee; the former is presumed to get a compensation for the risk, and the loss is, therefore, to be borne by him.

The guaranty of Messrs. Thelusson, for the payment of the plaintiff's bill in London, may be considered as a condition precedent; and, if so, the Messrs. Ludlow would have had a right to demand such guaranty, before the French merchants could have claimed a delivery of the property. The plaintiffs appear to have studiously guarded the contract, so as to retain the control over the shipment, until they should be secured in the pay-

ment for it. For this purpose they assumed all risks of every description until its arrival in France. There was the place designated for the consummation of the contract. The master of the vessel must have been their agent, and the bills of lading given on their account and risk, in order to retain the security; that being one of the principal ingredients in the contract. That the French merchants stipulated to pay the freight cannot be material, according to the opinion of Sir William Scott, in the case of the packet *DeBilboa*; and, indeed, he admits in that case, that a contract like the present, in time of peace, would be legal, and the right of property remain vested in the vendor. The parties have a right to stipulate that the whole risk should fall on the consignor, until the goods came into possession of the consignee, or they may divide the risk as they please. Thus far I have considered the transaction as between vendor and vendee, without any reference to the rights of third persons; and I think I am warranted in concluding that, as between them, the property must, at the time of the capture, be deemed to have vested in the plaintiffs. If so, their warranty has not been broken, unless the contract, under which the shipment was made, was illegal and void.

2. The second question then arises as to the legality of the contract. The warranty that the property was American means that it was so by the law of nations. This was so determined in the case of *Duguet v. Rhineland*. If I am correct in the conclusions above drawn, that a contract like the present would, according to the law of nations, be legal in time of peace, and that according to the established principles of law, the property would be deemed vested in the plaintiffs until an actual delivery in France, I cannot suppose that a state of war would change or vary the rules. I find no such principles recognized in the law of nations. The general rule is, that neutrals have a right to carry on commerce with the belligerent, the same in war as in peace, except in contraband goods, and to blockaded ports. Contracts like the present have unquestionably been considered, by Sir William Scott, in the British admiralty courts, as illegal; and were the rules there adopted to govern the case before us, we should be bound to pronounce that there had been a breach of the warranty. The warranty, however, is not to be tried by those rules, unless they are sanctioned by the law of nations. That courts of admiralty are sometimes governed by special instructions, which are not in perfect conformity with the general law of nations, cannot be denied. The rights of neutrals, as

well as those of belligerents, are to be regarded and protected. And it is not enough for the belligerent to say to the neutral, that because my right of capture is taken away, your trade is illegal. It is, undoubtedly, the interest of belligerents to consider all property bound to an enemy's country as belonging to an enemy, and, of course, exposed to capture and condemnation; but they have no right, in order to effect this, to establish arbitrary rules of property; one encroachment leads to and forms a precedent for another, and if yielded to it is difficult to say where they will end. There can be no doubt that the plaintiffs would have had a right to ship the cargo in question, not having made a contract for its sale on its arrival in France. It was not contraband, nor bound to a blockaded port. What have they done, then, by this contract? Nothing more than to secure a market on its arrival in France. What injury is done to belligerents? It is said that their right of capture is taken away; and so it would have been, had the shipment been made and no contract previously entered into. If abridging the chance of capture be sufficient to render commerce illegal, all trade by neutrals would be so. Sir William Scott gives us no authority to show that a contract like the one before us is illegal, according to the law of nations. For aught that appears to the contrary, the principle originated with him, or grew out of the special instructions of his government. He, however, says only that it is a rule of the prize courts that the property going to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, if taken *in transitu*, is to be considered as enemy's property: 3 Rob. 302; *The Atlas case of the Sally*, note.

If, by a rule of prize courts, he means only a rule of evidence, by which to ascertain the real owner, or that a cargo taken under such circumstances shall, *prima facie*, be considered enemy's property, the rule, perhaps, may not be exceptionable. But I cannot give my assent to it as a rule controlling the right of property. Property is, unquestionably, frequently transported under covered contracts, and, in this way, fraud is practiced upon belligerents. It is not, therefore, matter of surprise that their suspicions should be excited. But it is no just reasoning to say, that because a transaction may be fraudulent, it is fraudulent. Every case must stand on its own merits; and I see nothing in the one before us to warrant the conclusion that this was a fraudulent, or covered transaction, or that the contract does not represent the truth, with respect

to the ownership of the property; if so, and this be a legal contract, as I have endeavored to show, I am at a loss to discover the grounds for saying there has been a breach of the warranty.

Fraud would, no doubt, vitiate the contract; and could I legally intend, from the facts stated in the case, that this was a speculation tainted with that malady, that the property had ever legally vested in the French merchants, and that the contract was a mere cloak, for the purpose of deceiving belligerents, I should, most certainly, withhold from it my sanction. If such had been the intention of the parties, why enter into a contract, which, upon the face of it, might have the least appearance of unfairness? If the contract does not represent the real truth of the transaction between them, security for their respective rights must depend on some private and confidential understanding; in which case the present contract would be idle and nugatory. If fraud is to be imputed to the parties, it must be an inference of law, arising from the contract; for nothing, *dehors* the agreement, is shown in the least tending to such a conclusion, except that it was made during hostilities between France and England; and this does not appear to me sufficient to warrant the inference.

I see no impropriety in a French merchant's saying to an American merchant: If you will send your goods to France, I will purchase them of you, or to agree beforehand on a stipulated price, to be paid on their delivery in that country. The French merchant may not choose to run the risk of transportation, which the American merchant, for the sake of the profits arising out of the contract, may be willing to assume. I know of no law, nor any principle of reason or justice, that will deprive him of this privilege, provided the property continue, really, and *bona fide*, the property of the American merchant, until its delivery in France. According to my understanding of the case, then, its whole merits depend on the question, to whom was the property vested at the time of capture? And in whatever point of light I view it, I cannot resist the conclusion that it was in the plaintiffs. My opinion, therefore, is, that they are entitled to judgment.

KENT, C. J. There is no dispute between the parties in this cause as to the neutrality of the vessel. The affidavit of John Jackson, which was agreed to be received as part of the case, sufficiently establishes that she was American property. The great point is respecting the neutrality of the cargo. The ques-

tion is: Who were the legal owners of the goods, after their shipment and consignment to the merchants at Havre, the plaintiffs or their consignees? The plaintiffs are directed by a French house to purchase and transmit to them certain goods. They make the purchase, charge their commission for executing the order, and ship the goods, under a consignment to the French house. The freight or expense of transmission was to be borne by the consignees, and the risks attending the transportation depended upon a special and peculiar agreement between the parties. This agreement deserves particular attention, as the merits of the cause will turn upon its construction and legal operation. It is rather deficient in precision; but as I understand it, the plaintiffs expressly declare that they were not to assume the usual sea-risks; but that they ought to make the insurance, in order to prove the property theirs in case of capture; and that they would have to pay two and one-half per cent. for that insurance, and, consequently, they charge that advance to their correspondents. But they are to have a commission for the war-risks. This they ask as a premium for assuming that risk; or, in other words, a belligerent hires a neutral, at a commission of three per cent., to take upon himself the war-risk; the neutral will not assume the usual sea-risk; that he expressly declines; but, in order to render this assumption of the war-risk less hazardous, he says the insurance must be in his name, and he charges only what he will have to advance to effect it. The insurance was, therefore, an ordinary neutral insurance, estimated at two and one-half per cent.; and the plaintiffs, no doubt, made it as trustees for the French merchants, for whose benefit it was to enure, if the property was lost by the perils of the sea. The plaintiffs, upon this agreement, were then to make a clear gain of five and one-half per cent., all of which they emphatically term their commission; part of it was for their compensation, as agents, and the residue, as a premium for the war-risks they assumed. They ask no premium for the ordinary sea-risks, because it was agreed that they were not to assume them; and, of course, those risks must be borne by the consignees, who paid the insurance of those risks, amounting to two and one half per cent. This appears to me to be the real solution, the just analysis of this extraordinary contract. When, therefore, the plaintiffs, in the concluding part of their letter, speak generally of taking all risks and of receiving an allowance of eight per cent., this is easily explained, *reddendo singula singulis*, as the antecedent

parts of the letter had particularly specified what risks were to be assumed by the plaintiffs, and by what means, and for what services, the allowance was to arise. *Generalis clausula non porrigitur ad ea quæ antea specialiter sunt comprehensa.*

If we consider this contract for a moment independent of these singular provisions about the risk, the general rule of law would be that the property vested in the consignees upon the shipment and delivery to the master. But as even this principle seemed to be questioned upon the argument, it is proper to look into the authorities upon which it rests. A delivery to an agent for, and on behalf of his principal, will transfer the property, equally with a delivery to the principal himself. This is an elementary rule in the transfer of property; and the master of a vessel is considered as the agent of the assignee. In the case of *Evans v. Martell*, 1 Ld. Raym. 271; S. C., 12 Mod. 156, it was ruled by Lord Holt, and the court of K. B., that if goods by a bill of lading are consigned to A., A. is the owner, and must bring the action against the master of the ship, if they are lost. So in the case of *Godfrey v. Furzo*, 3 P. Wms. 185, the like rule was laid down by the attorney-general, and agreed to by Lord Chancellor King. It was there said that on delivery of the goods to the master of the ship, the property immediately vested in the consignee, who was to run the risk of the voyage. The same point was noticed and recognized by Lord Chancellor Hardwicke, in the case of *Snee v. Prescott*, 1 Atk. 248, in which he admitted that, if goods are delivered to a carrier to be delivered to A., and they are lost, the consignee only can bring the action, which showed the property to be in him, and he said it was the same where goods are delivered to a master of a vessel, though he allowed, at the same time, the right of the consignor to stop *in transitu*.

The right of stoppage *in transitu*, as between vendor and vendee, came from the court of equity. The first case in the books is that of *Wiseman v. Vandeputt*, 2 Vern. 203, in chancery. On the first hearing, the chancellor ordered an action of trover to be brought, to try whether the consignment vested the property in the consignee; and it was then determined in a court of law, that it did. But equity thought it right to interpose, and give relief; and since that time this new rule of stoppage *in transitu* has been admitted in courts of law as well as equity, between consignor and consignee, in case of the insolvency of the latter, and before actual delivery. This rule, however, is not considered as altering the strict right of property which,

by the old rule of law, vested in the consignee upon delivery to the carrier for him, and at his risk. The delivery to the carrier is a constructive delivery to the vendee, and the goods are considered in the possession of the vendee the instant they pass out of the possession of the vendor, to every other purpose but that of defeating this equitable right of reclaiming the property, upon the insolvency of the vendee: Buller, J., in *Ellis v. Hunt*, 8 T. R. 469. In the late cases of *Oppenheim v. Russell*, and *Dutton v. Solomonson*, 3 Bos. & Pull. 48 and 582, the court of C. B. considered the rule as well settled as any in the law, that upon delivery of goods to any general carrier, the whole property immediately vested in the purchaser, subject to this right of stoppage, upon the insolvency of the purchaser.

The only additional case that I shall mention is that of *Coxe v. Harden*, 4 East. 211, in the K. B., and that will be found upon examination to be a very strong and pointed authority. It was upon a purchase by agents abroad under orders, and when the goods were shipped, the shippers drew upon their principals for the amount, in favor of third persons, payable in sixty days, and gave notice, that they expected the bill would meet with due honor. The bill was transmitted at the same time, and in the same manner with the invoice and bill of lading, and the bill of lading was to the order of the shippers, and unindorsed. Under all these circumstances, however, the court had no hesitation in considering the property to have vested upon the shipment. They said, that a delivery to the master of a general ship, under a consignment, was a delivery to those to whom, and for whose use, the goods were sent, and at whose risk they were, during the passage; and that the property was subject only to be divested by the shipper's right of stopping in *transitu*, which they termed a species of *jus postliminii*. It was, indeed, contended, in that case, that as the bill of lading was unindorsed, and the bill of exchange for the amount transmitted concurrently, it showed that the shippers did not intend to convey the property, except conditionally, in case of the acceptance of the bill. But the answer was, that the shipment was at the risk of the consignee, without any such words of condition annexed. The same answer may be given to the like objection which the counsel raised, in this case, as the shipment here was in pursuance of orders, without any condition being annexed to the delivery, or shipment, relative to the furnishing of the guaranteed bills on London, and was, also, at the ordinary sea-risk of the consignees. This last risk they must

be deemed to have borne, as the shippers here declared they were not to assume it, as it falls, of course, upon the consignee, without a special agreement to the contrary, as the consignees were at the expense of the insurance; and the party who is at the expense of the insurance, is clearly at the expense of the risk.

The recent decisions in the English courts, I consider as correct expositions of the common law, for they only illustrate more fully the same principles which we find recognized in the time of Lord Holt. We have not, nor ever had, any such rule in our law, as that to be found in the civil and French law, 2 Just. 1, 41; and Pothier, *Traité du Contrat de Vente*, n 322, by which even a delivery does not transfer the property without payment, unless a credit be given. It would have been necessary to apologize for thus multiplying cases to a point which appears to have been so clearly and permanently settled, had not this very question: In whom was the title after the shippers had consigned the goods and delivered them to the master? been much examined upon the argument, and very different conclusions suggested.

The question on the right of stoppage, *in transitu*, does not arise in the present case; and, if it did, it is admitted (3 Bos. & Pull. 43, 47) that the right prevails only as between consignor and consignee, and does not affect the rights of third persons. The principle of the court of K. B., in the case of *Lickbarrow v. Mason*, is now considered (Abbott, par. 3, c. 9, s. 4, 4 East, 217) as the true and settled rule of law; which is, that if the consignee assign the bill of lading for a valuable consideration, and without notice, the property is thereby transferred, and the consignor is divested of his right to stop, as against such assignee. The present case is to be considered in the same light as if it were a contest between the consignor and third persons, who, by the right of war, have succeeded to the interest of the consignee. A title by capture by an enemy of the consignee, in open war, is as valid as if it had been acquired by assignment, and equally puts an end to the claims of the shipper; because, taking possession by the captor is equivalent, in respect to the question of property, to an actual delivery to his enemy.

But we are told that the title to the goods is in him who bears the risk of the transmission. If that rule were to prevail equally in time of war as in peace, the present case would not be affected by it, for the risk was here divided between the

parties. The plaintiffs took, by agreement the war risk, and charged a commission for it. The consignees were left to bear the sea risks, and had it insured, at their expense, though the insurance was effected in the name of the plaintiffs, the better to secure themselves against the other risk.

The question, however, arises, whether the agreement to assume the war risk was, in judgment of the law of nations, a valid agreement, as it respects the claims of a belligerent captor. The English prize courts hold all such agreements, made in time of war, constructively fraudulent and void; and they will not allow a neutral and belligerent, by a special agreement, to charge the ordinary rate in time of peace, by which goods, ordered and delivered to the master, are considered as delivered to the consignee: 3 Rob. A. R. 300, *in notis*; 2 Rob. A. R. 133. The reason assigned is, that such agreements would operate so as completely to cover all belligerent property, whenever the neutral was disposed, or could be hired to do it, since the risk of capture would be laid alternately on the consignor or consignee, as the neutral factor should happen to stand in one or other of those relations. The admission of this practice would certainly afford great opportunities, and great temptations, to fraud. The admiralty principle takes a strong hold on the mind, since its object is to prevent fraud, and to cherish good faith, which is a fundamental axiom in the code of public as well as municipal law.

It is not requisite, however, to place this case within the reach of the decision in the case of the *Atlas*, 3 Rob. 300, nor to assume the rule in the latitude it is there laid down; for the agreement before us strikes me as being fraudulent, in fact, and contrary to that candor and good faith which the law of nations requires. The goods were shipped in time of war, and the agreement appears to have been made with an express and pointed reference to maritime capture. For what other purpose, I would ask, but to cover the property from capture, should the plaintiffs assume the war-risk, and ask for it a commission; and yet leave the ordinary sea-risk to be borne by the French merchants, or by insurances made at their expense? Why did the plaintiffs propose to make the insurance in their own names, but to blind the belligerents, or, according to their own emphatic language, to prove the property theirs, in case of capture? If these propositions made and assented to, do not prove a collusive agreement to cover property, I should be at a loss to know what other combination of circumstances would

amount to such proof. It appears to me, plainly and strongly, that they were made for that purpose, and no other; and that the agreement ought, therefore, to be deemed void. If so, it then results that the property of the cargo was not American, and that the warranty is broken.

LIVINGSTON, J., having been concerned as counsel in the cause, gave no opinion.

Judgment for the plaintiffs.

HOLMES v. DeCAMP.

[1 JOHNSON, 24.]

SUIT BY FIRM AFTER A PARTNER'S DECEASE.—Where a partner had died, and the surviving partners had continued to trade under the firm name, and then an account between a debtor and the firm was stated, from which it appeared that a balance was due by the debtor for goods sold in the lifetime of the deceased partner; it was held that the surviving partners could recover this balance, without alleging the death of the other partner and the survivorship; as the stating of the account was in the nature of a new promise to the survivors.

PAYMENT BY NOTE.—If a negotiable note or bill of exchange be given for a simple contract debt, the party cannot recover on the original contract, unless he proves the loss of the note, or produces and cancels it at the trial.

ASSUMPSIT. The declaration contained counts for goods sold and delivered, money had and received, etc., and an *insimul computassent*. *Non-assumpsit* pleaded with notice of special matter to be given in evidence.

It appeared that the plaintiffs and Charles Holmes, who died in May, 1801, had, for some time prior thereto, been partners in trade under the name of Charles Holmes & Co.; that the defendant knew of Charles Holmes's death at or about the time it happened; and that plaintiffs afterwards continued business under the same firm name. The plaintiffs produced an account stated, wherein defendant admitted a balance of five hundred and thirty-two dollars and ninety cents, to be due to plaintiffs on the twenty-first of September, 1802. In August, 1802, plaintiffs, by their agent, made a settlement with the defendant and one Seymour, doing business under the name of Seymour & DeCamp, by taking notes for fifteen shillings in the pound, for a debt due plaintiffs from them. Defendant's account could not at that time be ascertained, as it depended on the result of

certain shipments; but he then declared that he desired no reduction of his indebtedness.

The counsel for the defendant moved for a nonsuit upon this evidence, as Charles Holmes was a partner in the firm at the time the goods were sold, which should have been made to appear in the declaration. The judge reserved the question.

Defendant then produced in evidence a power of attorney from plaintiffs and other creditors of Seymour & DeCamp, dated twenty-sixth August, 1802, authorizing one Dwight to compound with Seymour & DeCamp for their respective claims; and further proved that the attorney took a mortgage, dated October 15, 1802, payable in three years, from Edward Seymour to J. and N. Griffiths, as trustees of the creditors, to secure their several debts, and also to secure the debt for which the present action was brought. He offered also to prove that it was understood by the creditors who gave the power, that it authorized the settlement of this debt as well as the joint debts of Seymour & DeCamp; this testimony was rejected. Defendant then produced a written paper, from which it appeared that he had, on the nineteenth of January, 1801, given to Charles Holmes & Co. his promissory note for the goods sold and delivered to him, for which a balance was now claimed.

The judge observed that if a negotiable note had been given, and was not produced, he should consider it as a bar to the action on the implied *assumpsit*; the plaintiffs thereupon produced the note.

The jury found for the plaintiffs for the balance of the account, with interest. Defendants moved to set aside the verdict, and for a nonsuit, for the following reasons: 1. That Charles Holmes, being a partner with the plaintiffs at the time the goods were sold to the defendant, his death should have been stated, and the plaintiffs have brought their action as survivors; 2. That the vote ought to have been declared on; 3. Because the power of attorney and the proceedings under it show that this debt was secured by a mortgage, not due when the suit was commenced.

Emott, for the plaintiffs.

Evertson, for the defendant.

By Court, SPENCER, J. If there had been no count in the declaration on an *insimul computassent*, I should have considered the first exception as fatal, notwithstanding the cases cited by the counsel for the plaintiff: *Smith v. Barrow*, 2 T. R. 476;

Slipper et al. v. Stedstone, 5 T. R. 493; *French v. Andrade*, 6 T. R. 582. On examination, those cases will be found not to contradict the proposition that in declaring on a debt contracted with the plaintiffs and another, since deceased, his death and the survivorship of the others should be alleged; for otherwise it would not appear to be the same promise. The defendant, in September, 1802, stated an account exhibiting the balance due from him claimed by the plaintiffs. Formerly, the stating of an account was considered so deliberate an act as to preclude any examination into the items: *Truman v. Hunt*, 1 T. R. 40. A greater latitude has of late prevailed, and many errors may be shown and corrected; but still the stating of an account is regarded as a consideration for the promise; and it is in the nature of a new promise.

Technically speaking, a negotiable note is not an extinguishment of an antecedent debt, yet it has been deemed an extinguishment *sub modo*. In the court of king's bench (2 Bac. Ab. tit. Debt, G. 290, Gwillim's edit.; see, also, Bac. Ab. vol. 1, 281, note, and *Kearslake v. Morgan*, 5 T. R. 513) a negotiable note or bill of exchange has been held to be an extinguishment of a simple contract debt, the defendant being liable to pay the money to a third person. Though this principle is not to be found in any adjudged case, yet it is so reasonable and necessary a rule in a commercial country that I am disposed to adopt it with this qualification: that where a negotiable note has been given for a prior debt, not to suffer the plaintiff to recover on the original consideration unless he shows the note to have been lost, or produces and cancels it at the trial.

The power of attorney to Mr. Dwight did not, in its terms, authorize him to compound or take security for the debt in question; and the testimony offered to prove that it did give him that authority was of the most slender kind, the mere understanding of the general creditors of Seymour and De Camp. The judge, at the trial, very properly rejected this evidence; and if the plaintiffs will now stipulate to cancel and file with this court the note given to them by the defendant, the present motion ought not to prevail; otherwise I think it ought to be granted.

Judgment for the plaintiffs.

PEOPLE v. SANDS.

[1 JOHNSON, 78.]

INDICTMENT FOR NUISANCE, DEFECT IN.—On an indictment for a nuisance for keeping fifty barrels of gunpowder near the dwelling-houses of divers good citizens, and near a certain public street, etc., it was held that the allegation, in this manner, did not necessarily import a nuisance, otherwise if it had been charged to have been negligently and improvidently kept.

INDICTMENT for keeping a nuisance. There were two counts: The first stated that the defendants, on certain days at Brooklyn, near the dwelling-houses of divers good citizens of the state, and also near a certain public street, did keep and maintain and still keep, etc., a certain house, and in the said house did unlawfully and injuriously receive and keep, and still, etc., fifty barrels of gunpowder, to the great danger, damage, and common nuisance of all the good citizens there residing, and passing and repassing said street. The second count was for unlawfully and injuriously placing ten casks of gunpowder on a certain wagon, having iron-bound wheels, and transporting the powder through and along the main street of Brooklyn to the great danger, etc.

The defendants were tried and found guilty. The cause came before this court upon a *certiorari*, when defendants' counsel moved in arrest of judgment, on the ground that the acts charged in the indictment do not amount to a nuisance.

Ricker, for the people.

Jones, for the defendants.

THOMPSON, J. This case comes before the court on a motion in arrest of judgment. The indictment against the defendants is for a nuisance. In determining whether judgment ought to be rendered on the verdict of the jury, we can look only to the offense as charged in the indictment. We cannot judicially travel out of the record to inquire whether such facts do exist, which, if charged, would warrant a conviction of the defendants. We are only to determine whether the indictment before us presents such facts as in judgment of law amount to a nuisance. I am satisfied it does not. The indictment contains two counts. [Here the judge stated the substance of the first count.] The whole charge alleged against the defendants when stripped of the formal parts of an indictment, is that they kept fifty barrels of gunpowder in a house, near dwelling-

houses and near the public street. The indictment is not to be extended by inference or implication. It cannot, therefore, be intended that the house was insufficient to the purpose for which it was appropriated, or that due and ordinary care was not used in keeping the powder. If so, it appears to me to be too broad a rule to adopt that fifty barrels of gunpowder, kept in a proper house near dwelling-houses and near a public street, shall, *per se*, be deemed a public nuisance. Such circumstances may exist as to make it a nuisance; but those circumstances must be stated upon the indictment: 1 Burr. 337. The English statute and the statute of this state, regulating the manner of keeping and carrying gunpowder, are not declaratory acts, but contain new provisions and restrictions which afford an inference that the common law stood in need of some aid to guard against the evils apprehended from the keeping of gunpowder: 4 Bl. Com. 168.

The second count in the indictment, is still more clearly defective than the first, and needs only to be stated to show that no crime is there charged against the defendants. The allegation it contains is, substantially, that the defendants caused to be carried through the common and public street in the town of Brooklyn, two casks of gunpowder, in a cart, the wheels of which were bound with iron. The manner in which they were secured, or the quantity of powder contained in the casks, is not stated. The sympathy of the law for the fears of mankind would be great indeed, if the allegation contained in this count would constitute a public nuisance. There is nothing stated from which the court can intend the existence of real danger. My opinion, therefore, is, that judgment must be arrested.

LIVINGSTON, J. Whether a powder-house, near private dwellings and a public highway, be a common nuisance, is the only question on the first count in this indictment. I say powder-house, because although the building is not described as such, it may fairly be presumed from the indictment to have been erected and maintained for no other purpose. If it had been a dwelling, or any edifice in itself improper for keeping this article, it would have been so stated. In addition to this, the fact of its being a brick building, constructed for the storing of powder, and secured by conductors, and every other usual guard against accident, has come to my knowledge in such a way as will justify my now taking notice of it.

This is the second indictment tried before me for this nuisance. On the first trial it appeared that the store was strong,

built of most suitable material, and well defended against every probable danger; nor was there any pretense of its being negligently or improvidently kept.

The right of manufacturing and vending an article so essential to public defense, and of such extensive private consumption, will not be denied. From this must follow the right of storing it either for sale, or until it be wanted for national, or other purposes. The only difficulty is, to say how and where it shall be placed; here no other rule can be prescribed but by the legislature without excluding its use altogether, than that of keeping it any where, at the option of its owner; providing the lives of the surrounding, or passing inhabitants, be not thereby exposed to probable danger, either from the place, or manner of keeping it. If mere possible injury be a ground for a prosecution, it will amount to a total proscription of the commodity, unless in very small quantities indeed; for who can say that lives may not be lost, or houses destroyed, by an explosion of the hundredth part of the quantity which is alleged to have been stored in this building; and yet, because such an event be not impossible, a shopkeeper at Brooklyn would hardly incur the penalties of a nuisance, by keeping a reasonable quantity at a time, to retail, though more real danger is to be apprehended from such practice, than from much larger quantities in a powder magazine. In the latter place, it is only visited in the day, and by persons who will use more than common precaution, from the very circumstance of there being more than an ordinary quantity collected in one spot, and as they will inevitably be the first and certain victims of an explosion. Except when thus visited, there can be but little or no danger. It is never approached by fire, and from the effects of lightning it is protected by its rods. A safer mode of keeping this article than in a building thus constructed, cannot well be devised; but if it be not permitted to place them near to any dwellings or highways, which, by the by, is not a very definite term, who would be at the expense of their erection? If a desert spot, at a great distance from any habitation and road, must be selected, the additional expense of transportation, and danger of robbery, will deter every one from providing such repositories; the consequence of which will be, that it must be kept in houses or places less safe to those in its vicinity.

The danger of a magazine's exploding, when properly built and secured, is remote indeed; so much so, that a jury of Queen's county, by whom the first traverse was tried, after a

very long examination, acquitted the defendants on that very ground; for only one witness was produced who had ever heard of that event, and that but once. On the trial of the second indictment, by a jury from King's county, that point was not submitted to them, because a majority of the court determined, as a question of law, that a powder-house thus situated, however built or maintained, was a nuisance, so that the fact of its erection was alone before them. I was well satisfied myself from the former investigation, that the probability of an explosion was too remote to justify the apprehensions which many of the witnesses, who lived in the neighborhood, seemed very honestly to entertain. The jury, who acquitted the defendants, were of the same opinion, though many of them must frequently have passed the noxious building on their way to and from the New York market. This opinion acquires some strength from the silence of our books, and as there does not appear among the various printed forms of indictments a single precedent to suit the present case. The district attorney produced none, and those to which he referred only established what was not denied, that animals which it is lawful to keep, and which are not nuisances, *per se*, may, under certain circumstances, become so. Thus bulls, dogs, and many other beasts, if particularly vicious, or dangerous, and carelessly kept, are regarded as common nuisances. Precisely on this footing stand powder-houses. Of themselves they are innoxious, although not distant from mansions or highways, unless negligently secured or attended.

The only case, 12 Mod. 342, which bears the semblance of an authority, was decided at *nisi prius*; for that of *Rex v. Taylor*, 2 Str. 1167, does not state where or how the powder-house was kept. And whether the house, whose owner was indicted, was a private dwelling, or one erected for the purpose, and well secured, does not sufficiently appear. The point resolved, however, was not that a powder-magazine was not, in itself, a nuisance, but that to render it such, there must be "apparent danger, or mischief already done;" for, as Lord Holt well remarks, "though gunpowder be a necessary thing, and for the defense of the kingdom, yet if it be kept in such a place as is dangerous to the inhabitants, or passengers, it will be a nuisance." This is a rule too reasonable not to command our ready assent, and if the jury had passed on this point, there would be no hardship in rendering judgment on the verdict; but they were told by me, in compliance with the unanimous

opinion of the magistrates, who sat in the oyer and terminer, that a powder-house was, *ipso facto*, a nuisance, and not a witness was examined to show the apparent danger of the one in question. The transaction having passed exactly as is here stated, it would be folly to suppose, contrary to what I know to be the truth, that the defendants were convicted upon the probable danger to which the public were exposed, especially when the form of the indictment is not such as necessarily to lead to this conclusion. The mere laying a thing to be *ad commune nocumentum* is not sufficient, but the court must examine, says Mr. Justice Fowler, whether the fact laid implies a nuisance.

If the rule of Lord Holt, and which is here adopted, be not a safe one, it is better that the legislature should interfere, than to put these buildings under the unlimited control of a jury of the vicinage, who, however honest, will be more or less influenced by imaginary fears, which artful men will not fail to cherish and increase. Both in England, and in this country, such interference has taken place, which furnishes a pretty strong argument against powder-houses being nuisances at common law. By the stat. 12 Geo. III, c. 61, the making, keeping and transporting of gunpowder, is regulated under heavy and various penalties. This act, which has not declared any of the offenses therein enumerated a common nuisance, also directs that powder-houses should be erected of the same materials of which this is composed.

The only act we have relating to this matter, is confined in its operation to the city of New York; the legislature not having thought proper to extend its provisions to other districts of the state. This statute prescribes penalties for keeping more than a certain quantity in any one place in the city, except in the public magazine at Freshwater, or in a different manner than is there enjoined, and regulates the manner of its carriage through the city; but also omits making any of the offenses common nuisances. It is not hence contended, that keeping this article in a powder-house properly constructed, may not, in cases of gross negligence, become dangerous, and a nuisance; but that the storing of it in this way, is lawful in itself, and not in every instance a nuisance, on account of the building being in the neighborhood of dwelling-houses or contiguous to a highway.

The only difficulty I feel in this cause, arises from the manner in which it is brought before us, and not from any intricacy

in the real question, which, from what passed at the trial, I know it was the intention of both parties to submit. But besides the answers already given to the argument drawn from a probability that the jury proceeded on the ground of negligence, there is another, which is suggested by a palpable defect in the indictment. It states that the defendants did "unlawfully receive and keep, and yet do keep, in their house, fifty barrels of gunpowder," which is the only alleged cause of the hazard complained of. Now, if it be not unlawful, as has been shown, to store gunpowder in this way, we cannot give judgment against the defendants, without recognizing a principle, which must end in the demolition of every powder-magazine in the state. It is essential that every indictment of this kind, where the principal act is lawful, should state with precision, what has rendered it otherwise; that is, from what causes arise the dangers which it is contemplated to suppress. In this instance, the prosecutor ought to have alleged a want of care or some negligence in the manner of its storing or keeping; because, whether a lawful act becomes a nuisance in a particular way, or in consequence of inattention, is oftentimes a question of law, on which a defendant is not obliged to acquiesce in the opinion of a jury. But, of the judgment of the court he will be debarred, if bills may be drawn in this general way, and every defect supplied by presumptions (which, in this case, are directly against the truth), that everything was proved necessary to constitute a nuisance. I take no notice of the second count, because no attempt was made to support it.

My opinion is, that it is not unlawful, except in the city of New York, to keep gunpowder in a magazine properly constructed and secured, though the same be near to dwelling-houses and a public street; but that if, by negligence or want of care, it becomes dangerous, the owner may be indicted; and further, that such negligence, being the gist of the offense, should appear of record, so that the grounds on which a jury proceed may not be matter of conjecture, but be tested by the acts laid in the indictment. No negligence or want of care being stated, and knowing, judicially, that none was proved, I am of opinion that judgment must be arrested.

KENT, C. J. The first count in the indictment merely charges that the defendant kept fifty barrels of gunpowder in a certain house in Brooklyn, near dwelling-houses and near the public street. It does not state the manner in which the house and powder were kept, and the validity of the count depends upon

this general question, whether fifty barrels of powder, kept in a house near dwelling-houses and the public street, is, *per se*, a nuisance. There is no allegation that the house or powder were carelessly kept, and we must consider the case as if it were kept with the greatest discretion and security. The indictment cannot be extended by inference or implication. The only question is, whether the facts laid imply a common nuisance. I am clearly of opinion that they do not, and that a powder-house near dwelling-houses may, or may not, be a nuisance, according to circumstances, and which circumstances must be explicitly stated in the indictment, so that the defendants may be prepared to meet them, and so that the court may judge of their force: Hawk., book 1, c. 76, s. 88.

The books contain very few cases on the subject. There is an anonymous case in 12 Mod. 342, and said to have been decided before Holt, C. J., at *nisi prius*, on an indictment for keeping several barrels of gunpowder in a house in Brentford, till they could be conveniently sent to London. The indictment is not given, and we cannot, therefore, know under what circumstances the powder was charged to have been kept; but from the temporary deposit of it, we may infer that it was not deposited in a house well prepared for its reception. In that case Holt is said to have ruled, that to support the indictment, there must be apparent danger, or mischief already done; and that if the house where the powder was kept was appropriated for that use before the houses near by were erected, it is no nuisance, and that if gunpowder be kept in such a place, as it is dangerous to the people, it becomes a nuisance. This case, as far as it is any authority, goes in confirmation of the principle, that the time, place and manner are all important and essential in determining whether a powder-house amounts to a nuisance; but considering the loose manner in which this case is reported, and the book in which it is found, it is not entitled to much, if any, consideration. The case of *The King v. Taylor*, Str. 1167, was also cited, but it throws no light on the question; it states merely the fact that the court of king's bench granted an information against the defendant, as for a nuisance, for keeping great quantities of gunpowder, to the endangering the church and houses where he lived.

The inference to be drawn from the British statute of 5 Geo. 1, c. 26, is certainly of very considerable weight in the argument that a powder-house near dwelling-houses is not of itself, and under all circumstances, a nuisance. That statute recites that great quantities of gunpowder were frequently kept in

warehouses and other places, in and about the cities of London and Westminster, to the apparent danger of the inhabitants; and it enacts that from a certain day thereafter, it should not be lawful to keep above six hundred weight, at one time, in any warehouse or other place, within the said cities; and it is worthy of notice that the statute also declares that after a certain day it should not be lawful to carry through the streets more than two thousand weight of gunpowder at one time, and particularly prescribes the mode of carriage. If the present indictment be good, these stores of gunpowder within the city of London were probably all nuisances, as they must have been near dwelling-houses and other buildings, as well as near public streets. It can hardly, however, be supposed that if they were so, the frequent use of them would have been endured, and that it would have been deemed requisite to have declared that after such a day they should be unlawful. It is not unfrequent for a statute to come in aid of the common law, by giving a new remedy, or additional penalties. The case of keeping swine within the paved streets of the city of London, where the houses are contiguous, is mentioned as an instance; but the language of the statute of 2 W. & M. sess. 2, c. 8, s. 20, is in that case very different. It declares that for the better keeping the streets, etc., no person shall breed or keep swine under the pain of forfeiting them, and does not declare that the practice thereafter shall be deemed unlawful, for the common law had already made such a declaration: 2 Salk. 460.

The second count in the indictment admits of much less doubt than the first. It contains only the naked fact that the defendants caused to be carried through the street ten casks of powder in a cart, the wheels of which were bound with iron. The quantity of powder in these casks, or the manner in which they were secured in the cart, is not stated, and it appears to me impossible to adjudge that the act alone amounted to a nuisance, however well the powder might have been guarded from accident, and however small the quantity might have been. The fears of mankind will not alone create a nuisance, without the existence of real danger: 3 Atk. 750.

I am of opinion accordingly that judgment ought to be arrested.

TOMPKINS, J., having been concerned as counsel, gave no opinion.

SPENCER, J., delivered a dissenting opinion.

Judgment arrested.

SCHEMERHORN v. VANDERHEYDEN.

[1 JOHNSON, 139.]

ACTION ON PROMISE ON BEHALF OF A THIRD PERSON.—A parol promise from one person to another for the benefit of a third, will enable such third person to maintain an action on the promise.

EVIDENCE AS TO CONSIDERATION IN DEED.—Where the consideration is recited in a deed, parol evidence is inadmissible showing that a different consideration than that expressed was intended.

CERTIORARI. It appeared that the defendant in error, the plaintiff below, declared on a promise made by the plaintiff in error to one J. C. Schemerhorn, to deliver a desk worth twenty-five dollars to Catharine, Vanderheyden's wife. No consideration was stated for the promise. *Non-assumpsit* was pleaded. On the trial, J. C. Schemerhorn testified that Schemerhorn had applied to witness for an assignment of his personal property, which witness promised to make, but declared that defendant must purchase a desk for the plaintiff's wife, who was witness's daughter and defendant's sister. The assignment was made, and expressed to be in consideration of natural love and affection, and of a bond executed by defendant Schemerhorn for the maintenance of witness and his wife during their lives. To the admission of parol evidence to show a greater or different consideration than that expressed in the assignment, defendant objected; but the judge ruled that parol evidence might be given to the jury in regard to the desk. A verdict was found for the plaintiff, and the defendant excepted.

The two principal exceptions to the judgment below were: 1. That no action could be maintained by the plaintiff on a promise made by the defendant to John C. Schemerhorn; 2. That the parol evidence as to the further consideration of the assignment, was inadmissible.

By Court. As to the first objection, we are of opinion that where one person makes a promise to another for the benefit of a third person, that third person may maintain an action on such promise. This was the doctrine of the king's bench, in the case of *Dutton v. Pool*, 2 Lev. 210, affirmed in error. The same principle has, since that time, been repeatedly sanctioned by the decisions of the English courts: Vide 3 Bos. & Pull. 149, in the notes to *Pigot v. Thompson*. But the second objection is well taken. The consideration for the assignment of the personal property of John C. Schemerhorn, is expressly stated in the deed of assignment itself, and the parties are thereby pre-

cluded from setting up any greater or different consideration: *Preston v. Merceau*, Black. R. 1249. To allow of parol evidence for that purpose would be to extend, or substantially to vary the language of a written contract. Though the promise in question may have been made previously to the assignment, yet after the execution of the instrument, we must presume that the father and son altered the consideration mentioned at first, and finally acted upon that set forth in the assignment. Until the assignment was made, the promises, not being in writing, were not valid in law, and, therefore, no right of action vested in the *cestui que trua* in consequence of the first agreement between the father and son. That was a preliminary agreement, void by the statute of frauds, and was waived when the parties consummated their contract by the written instrument.

Judgment reversed.

PROMISE FOR BENEFIT OF THIRD PERSON.—This is the first reported case in this country, showing that a person may have a right of action on a promise or agreement by another on his behalf. The English case to which frequent reference is made, and which is regarded as the first case clearly establishing the doctrine, is *Dutton v. Poole*, 1 Ventr. 318, 332. There, a father desired to raise a portion for a daughter, and for this purpose was going to cut down timber to the value of one thousand pounds from his estate. His son, the heir, agreed to pay the daughter one thousand pounds, and therefore the father forbore cutting the timber. The money was not paid, Dutton and wife, the daughter, brought the action against the son, the defendant. It was claimed on behalf of the latter that no action would lie on behalf of the daughter, because, where the party to whom the promise is to be performed is not concerned in the meritorious cause of it, he cannot recover. But the court gave judgment for the plaintiff, saying it might be a different case if the money was to have been paid to a stranger; but here, there was such a nearness of relation between the father and the child, and it being a sort of debt to the child to have a provision made, that there was sufficient consideration to support the action. Now, here the court did not proceed quite so far as do the courts in cases that have taken this as a precedent; for they seem to have supported the action on the ground of a consideration on behalf of the plaintiff. However, it is now a well settled doctrine in the American law that a third person can maintain an action on a promise made to another on his behalf. Parsons, 1 Contr. 468, says: "In this country the right of a third party to bring an action on a promise made to another for his benefit seems to be somewhat more positively asserted; and we think it would be safe to consider this a prevailing rule with us. Indeed, it has been held that such promise is to be deemed made to a third party, if adopted by him, though he was not cognizant of it when made." This is fully supported by adjudged cases in this country: *Mason v. Hall*, 30 Ala. 601; *Treat v. Stanton*, 14 Conn. 454, following *Dutton v. Poole*, and the principal case; *Morgan v. Overman Co.*, 37 Cal. 537, citing the principal case; *Bristow v. Lane*, 21 Ill. 194; *Beals v. Beals*, 20

Ind. 163; *Allen v. Thomas*, 3 Metc. Ky. 198; *Bohanan v. Pope*, 42 Me. 93; *Felton v. Dickinson*, 10 Mass. 287; *Arnold v. Lyman*, 17 Id. 400, to which many refer as a leading case; *Carnegie v. Morrison*, 2 Met. 318; *Brewer v. Dyer*, 7 Cush. 337; *Ruhling v. Hackett*, 1 Nev. 370; *Lang v. Henry*, 54 N. H. 63; *Joslin v. New Jersey Car Co.* 36 N. J. L. 141; *Price v. Trusdell*, 1 Stewart, 200; *Lawrence v. Fox*, 20 N. Y. 268, citing the principal case on this point; *Burr v. Beers*, 24 Id. 178, citing the principal case; *Beers v. Robinson*, 9 Pa. St. 229; *Bellas v. Fagely*, 19 Id. 276; *Jones v. Thomas*, 21 Gratt. 101; *Kimball v. Noyes*, 17 Wis. 698.

PAROL EVIDENCE TOUCHING CONSIDERATION.—The authority of the principal case as to parol evidence not being admissible to vary the consideration expressed in a deed, is undermined in New York. It is now the doctrine of that state, as indeed the general doctrine, that parol evidence may be admitted to show no consideration was paid when the deed recites and acknowledges payment, and to show additional, or less, or in fact a different consideration. The doctrine laid down in the principal case was first shaken in *Shephard v. Little*, 14 Johns. 210; then in *Bowen v. Bell*, 20 Id. 338. But the leading case, which fully examines the authorities and modifies the doctrine asserted in the early cases, is *McCrea v. Purmort*, 16 Wend. 460. Cowen, J., in an elaborate opinion follows the history of adjudication on this point, and finally shows that in nearly all of our states the consideration clause in a deed is open to the widest latitude of explanation. So, in this case it was held that where the consideration in a deed conveying lands was expressed to be money paid, it could be shown by parol evidence that the consideration instead of money was iron of a specified quantity, valued at a stipulated price. This case is regarded as settling the doctrine in New York. Thus in *Witbeck v. Waine*, 16 N. Y. 538, the court say: "By the later cases it is well settled that that clause may be contradicted by oral evidence as well in regard to the amount expressed as to the fact of its payment, and also as to the quality of the consideration: *Shephard v. Little*, 14 Johns. 210; *Bowen v. Bell*, 20 Id. 338; *McCrea v. Purmort*, 16 Wend. 460; *Adams v. Hall*, 2 Denio, 306. If the opinion of Mr. Justice Cowen, in *McCrea v. Purmort*, is to be followed, and I do not see why it should not be, the consideration clause is of no greater effect than a separate receipt for the money, which might always be explained. And in *McKinster v. Babcock*, 26 N. Y. 380; *Barker v. Bradley*, 42 Id. 320, the same views are asserted, and the authority of *McCrea v. Purmort* fully indorsed. The Massachusetts cases maintain the same doctrine. In *Wilkinson v. Scott*, 17 Mass. 249, Parker, C. J., says: "A man is estopped by his deed to deny that he granted, or that he had a good title to the estate conveyed; but he is not bound by the consideration expressed, because that is known to be arbitrary, and is frequently different from the real consideration of the bargain." And see *Davenport v. Mason*, 15 Mass. 85; *Bullard v. Briggs*, 7 Pick. 533. But in *Miller v. Goodman*, 8 Gray, 542, the court lays it down that an additional consideration, consistent with that which is expressed, may be shown by parol evidence. This would not seem to carry the admission of parol evidence as far as the New York cases. In Connecticut, see *Belden v. Seymour*, 8 Conn. 304; *Collins v. Tillou*, 26 Id. 368. In *Goodspeed v. Fuller*, 46 Me. 141, it is held that the only effect of the usual clause in a deed acknowledging the payment of the consideration, is to estop the grantor from alleging that the deed was executed without consideration. For every other purpose, it may be explained, varied or contradicted by parol proof. And the same doctrine was maintained in *Emmons v. Littlefield*, 13 Me. 233;

and *Steele v. Adams*, 1 Greenlf. 1. And to the same point, see *Harrison v. Castner*, 11 Ohio St. 339; *Rockhill v. Spriggs*, 9 Ind. 30; *Jones v. Jones*, 12 Id. 389; *Holbrook v. Holbrook*, 30 Vt. 532; *Swafford v. Whipple*, 3 Iowa, 261; *Belles v. Brooks*, 2 Zab. 680; *Hamilton v. Maguire*, 3 Serg. & R. 355; *Prichard v. Brown*, 4 N. H. 400; *Peck v. Vendenberg*, 30 Cal. 23, following the authority of *McOrea v. Purmort*; *Rhine v. Ellen*, 36 Id. 369.

SUYDAM v. THE MARINE INSURANCE CO.

[1 JOHNSON, 181.]

WHAT CONSIDERED A LOSS.—Insurance was effected on the cargo of a vessel at and from New York to a port or ports in the island of Cuba, thence back to New York. The policy contained the usual clause to be free from any loss arising in consequence of illicit trade, etc. The vessel arrived at her port of destination, but was not allowed entrance, and after waiting twenty days, sailed for another port in the island; meeting on the way adverse winds, she was compelled to put into a port of safety, but fearing pirates, then she went to Port Republican, in St. Domingo, where the cargo was forcibly taken out, and disposed of at great loss. On receiving advice of this circumstance, the insured abandoned for a total loss, and in their letter assigned as a cause, that the vessel had been refused entry at her port of destination, and the voyage was therefore defeated. It was held that the denial of entry was not a loss within the policy.

WHEN ABANDONMENT MADE, CAUSE TO BE ASSIGNED.—When the insured makes an abandonment, he must assign the true cause. If he assign an insufficient cause, he is bound by it, and cannot take advantage of a subsequent event, without a new abandonment.

ACTION to recover for a total loss on a policy of insurance on the cargo of the sloop *Mason's Daughter*, at and from New York to a port or ports in the island of Cuba, and from thence back to New York. The policy was for the sum of twelve thousand dollars, dated January 7, 1802, and contained the usual printed clause: "To be free from any loss which may arise in consequence of a seizure or detention for, or on account of, illicit or prohibited trade."

On the trial, before Justice TOMPKINS, the following facts appeared: The vessel sailed from New York January 12, 1802. The master, who was consignee, was ordered to proceed first to St. Jago de Cuba and dispose of so much of the cargo as could be sold there to advantage, then to sail to the north side of the island to the port of St. Juan Los Remedios, and sell the residue; or in case it could not be sold there, to go to Matanzas. The master was furnished with passport received from the president at Havana, and certified by the Spanish consul at New

York. On arriving at Moro Castle, the vessel was not permitted to enter St. Jago de Cuba; but there being a difference of opinion between the governor and officer of customs as to the regularity of the passport, the master was induced to wait twenty days, when he set sail for St. Juan Los Remedios. Meeting with adverse winds, he was forced into the bite of Leogane, where, being afraid of pirates, he did not anchor, but with the advice of the crew, put into Port Republican to wait for favorable winds to prosecute the voyage. By the authorities at this port, the master was compelled to land his whole cargo and sell it at a great loss. It was proved that several American vessels had been allowed to enter at Matanzas with similar passports, and that another American vessel had entered at Havana in February, 1802, without any passport from the Spanish consul.

On the third of April, 1802, plaintiff addressed a letter of abandonment to the president of the Marine Insurance Co., informing him that they had received "advice from the master of the *Mason's Daughter*, dated at Port Republican the seventeenth of March; that presuming that he was not permitted to enter at St. Jago de Cuba, the place of destination, they considered the object of the voyage defeated, and, therefore, they abandoned," etc.

The jury found a verdict for the plaintiffs for fourteen thousand three hundred and ten dollars, subject to deductions by the agreement of the parties.

Benson and Hoffman, moved for a new trial, on behalf of the defendants, and in support of the motion, insisted: 1. That the plaintiff could not recover for any other cause than the supposed loss by reason of the vessel's having been refused an entry at St. Jago de Cuba; 2. That, from the evidence, the plaintiffs were not entitled to recover on that ground; 3. That no judgment could be rendered on the verdict as found.

They contended that to entitle the plaintiffs to an indemnity, on the ground of the refusal of entry, there should have been a special provision to that effect in the policy. The refusal arose from irregularity in the papers, and the insured must bear all losses, owing to a failure to provide the papers proper for the prosecution of the voyage. The stay at Moro of twenty days was a deviation: Marsh. 170, 405. The verdict is informal, and a mere nullity. The evidence clearly shows the loss not to have been total.

Radcliff and Riggs, for the plaintiffs. The denial of right of entry is not the only ground for claiming a total loss; but that fact alone may be considered sufficient, as it was the direct cause of the actual loss. The sloop carried all the papers required by the laws of the United States for an American vessel. Whether the delay at Moro was unreasonable or not has been submitted to the jury. The refusal of the permission to enter amounted to a technical loss, and the sale at Port Republican was an actual total loss. That an insufficient cause for abandonment was stated, does not affect plaintiffs' right, as there was a valid cause existing.

By Court. LIVINGSTON, J., delivered the opinion of the court. It is said, here was no abandonment, or that the reason assigned for it was not sufficient, and that, therefore, the abandonment made was a nullity. A denial of entry at the port of destination, without any seizure or arrest by government, appears to me, after considerable reflection, and many doubts, not a loss within this policy, which contains an express agreement, "that for a seizure or detention on account of prohibited trade, there shall be no remedy." How, then, can underwriters, who do not assume the greater risk of seizure, which, in common cases, constitutes a technical total loss, be answerable for a smaller one, proceeding, too, from the same cause, that is, an illicit trade? But, as the *Mason's Daughter* had a right to go to another port, and was driven into Port Republican on her way thither, it is supposed that the abandonment must be considered as founded on the latter accident, especially as it was not made until after her arrival there, and intelligence of it received here. But if this were really the cause of abandoning, it is not the one assigned by the assured. On the contrary, it is placed entirely on the refusal to permit an entry at the first port. It will hardly be said, that to constitute a valid abandonment, it is not necessary to state the true cause. Though no form be prescribed for this act, yet care should be taken that it be unconditional, explicit, and on sufficient ground, and, particularly, that the accident occasioning it be described with certainty, so as to enable an underwriter to determine whether he is bound to accept. If he be not, he will, of course, refuse, and neglect to take measures for the preservation of the property, which is one object of making an abandonment. The assured here, having relied on matter which was not a justifiable cause, must be bound by it, and shall not be permitted to avail themselves

of a subsequent accident without making a new abandonment. Emerigon, vol. 2, p. 19, appears to be of this opinion; he considers an abandonment absolutely null, if, at the time, there was neither "a capture, nor shipwreck, nor stranding, nor arrest of princes, nor unnavigability, nor a total loss;" and adds, "an abandonment founded in error produces no effect." Our opinion, then, is, that here was no valid abandonment; and though it be settled with us that such an act is never too late, while the loss continues total, yet we have not said that a suit can be maintained, without any abandonment at all, or on one assigning a reason which justified a refusal to accept.

Another objection to a recovery, which applies as well to a partial as a total loss, is, that the long stay at St. Jago de Cuba, or at the mouth of the river, amounted to a deviation; but the jury having determined otherwise, we are satisfied to consider this question at rest. I will only add, that the agreement of counsel to adjust the accounts, must have referred only to the case of the defendants being liable for a total loss, and that, therefore, the plaintiffs have no right, under that agreement, so to model the verdict as to give them what would be a compensation for a partial loss, admitting a right to that extent to exist. To ascertain this point, and what, in such case, will be a proper rule of damage, there must be a new trial, with costs to abide the event of the suit.

I observe, further, that it is not intended to say what would be the effect of a denial to trade, if the voyage insured had ended at St. Jago de Cuba; that is, whether the risk would have ended there, or have continued to another port. The assured having a right in this case to go elsewhere, that question is not before us.

New trial granted.

POTTER v. LANSING.

[1 JOHNSON, 215.]

DAMAGES FOR ESCAPE.—In an action against a sheriff for an escape and false return, on mesne process, the plaintiff can recover no more than he might have done in the original action, and his actual recovery ought to be the amount of his loss, in consequence of the escape.

WHO HAS RIGHT OF ACTION AGAINST COMMON CARRIER.—Where goods were shipped for the account and risk of the consignee, he paying the freight, and it was so expressed in the invoice and bill of lading, a delivery to the carrier is considered a delivery to the consignee, who alone can maintain an action against the carrier for a non-delivery, as by the bill of lading the property became vested in him.

ACTION on the case for an escape and false return on mesne process. The facts were: One Briggs was the master of the schooner Friendship, and signed bills of lading for a quantity of goods shipped on board his schooner by plaintiff, to be delivered to parties at Kingston, Jamaica. The goods were valued at one thousand six hundred and fifty-five pounds, nine shillings and three pence in the invoice, which stated that they were shipped for the account and risk of the Kingston merchants, who were to pay freight. Briggs never delivered these goods to the consignees, but ran away with them. It was shown that a balance on account of one hundred and twenty-nine pounds, eleven shillings and three pence, was also due from Briggs to plaintiff. At the suit of plaintiff, Briggs was arrested by defendant, sheriff of New York, on a *capias ad respondendum*, and, after being in jail some weeks, escaped. The defendant made a special return of a rescue to the writ.

Defendant offered testimony to prove that plaintiff's attorney, since deceased, hearing of the exertions made to retake Briggs, said that it was no matter; that Briggs was not worth a cent, and that the defendant need not return the writ. This testimony was rejected.

It appeared in evidence that Briggs, while in prison, was very poor, and made his escape through the contrivance of some visitors; that defendant had made diligent pursuit after Briggs, and was at considerable expense in endeavoring to retake him, but without effect.

The judge charged the jury that he thought the facts did not justify the return of a rescue; that the plaintiff had established his right of action against Briggs for the value of the goods, as well as for the balance of account; but that the jury were the judges of the damages under all the circumstances of the case; that Briggs's poverty might be considered in mitigation of damages; and that if the return had been made by defendant fraudulently, it would be an aggravation of damages.

Verdict for plaintiff for three thousand dollars, in which estimate the jury said they considered both the amount of invoice and balance of account.

Hoffman and Harison, for the defendant, moved to set aside the verdict, contending: 1. That the declarations of the attorney ought to have been received, if not as an excuse to the sheriff, at least in mitigation of damages; 2. That plaintiff had no right of action. It is well settled that where goods are consigned for the account and risk of the consignee, who is to pay

freight, the property is transferred by the bill of lading subject only to the right of the consignor to stop *in transitu*: *Snee v. Prescott*, 1 Atk. 245; *Evans v. Martlett*, 1 Ld. Raym. 271; *Newson v. Thornton*, 6 East. 22; *Cox v. Harden*, 4 Id. 211; *Hodgson v. Loy*, 7 T. R. 440; *Dawes v. Peck*, 8 Id. 330; *Dalton v. Solomonson*, 3 B. & P. 582; *Lickbarrow v. Mason*, 6 East. 21. Should the present plaintiff recover the amount of the invoice, Briggs would still remain liable to the consignees.

Riggs and Radcliff, for the plaintiff. The attorney's declarations were nothing but a mere opinion, which had no influence on the sheriff's conduct, and were properly rejected; 2. A right of action exists in the consignor, founded on the contract with the carrier, as well as the action in favor of the consignee founded on the right of property. Whatever the rights of third persons may be, the carrier is estopped to deny the consignor's claim. The action may be brought either in the name of the person to whom the promise was made, or in the name of him for whose benefit it was intended: *Dutton v. Poole*, Sir T. Raym. 302; *Hornsey v. Dinoche*, 1 Vent. 119; *Bell v. Champlain*, Hardre, 321; *Stackley v. Mill*, Sty. 296. The damages are not excessive; there was undisputed evidence of a return false in law and fact, which is just reason for increasing the damages.

By Court, TOMPKINS, J. The declarations of the plaintiff's attorney, offered as evidence on the trial, proved nothing more than his opinion at that time of the solvency of Briggs. This would not be legal and proper testimony of that fact; and had the attorney himself been alive, and produced as a witness, he would not have been permitted to give his own surmises, or belief upon the subject, but must have detailed facts, that the jury might draw their inferences from them. The proposed testimony to establish the insolvency of Briggs was properly overruled. But the escape was before the day on which the writ was returnable; and a recaption of Briggs by the sheriff before the return, might have been pleaded, and would have shielded him in an action for the escape. If, therefore, the conduct or declarations of Mr. Remsen, who was the attorney of Potter, and had the control of the suit, had a tendency to throw the sheriff off his guard, or to induce him to forbear to make exertions to apprehend Briggs, such conduct or declarations ought to have had an influence in the cause, and should not have been excluded. In granting new trials, however, upon the subsequent discovery of testimony, or for the rejection

of testimony offered, we ought to consider whether it would, or ought, to vary the issue of the cause; if it would not, the court will not send the cause again to a jury. In the case now under consideration, the declarations of Remsen were made after the sheriff had used the most active exertions, and had spent large sums of money to retake Briggs, and after his agents had returned from Massachusetts, and abandoned the idea of retaking him. Though not expressly stated, yet it is to be inferred from the case, that before the declarations of Potter's attorney were made, the return day of the writ had passed. Under these circumstances, it is evident that the observations of the attorney could have had no tendency to prejudice the sheriff, or relax his exertions, and therefore, if admitted, ought not to have varied the verdict of the jury.

It is impossible to determine whether the circumstance of the defendant having made a false return to the writ, operated on the minds of the jury to increase the damages. The judge was perfectly correct in stating to them that the return was legally false. But I do not think that, even if the sheriff knew it to be so, it ought to aggravate the damages. The true question is, what has the plaintiff lost in consequence of this escape? The alleged false return by the sheriff, neither adds to nor diminishes the loss; and, therefore, the solvency of Briggs or his capacity to pay, must determine the quantum of damages sustained. If the circumstance of a false return be a substantive ground of damages, it would follow, that where the person escaping was perfectly solvent, and the sheriff makes a false return, the creditor might recover in damages more than the full amount of his debt.

But the damages are excessive, for another and much more cogent reason. The jury founded their verdict upon Potter's right of action against Briggs, not only for the balance of the account current, but also for the goods specified in the bill of lading and invoice. It appears to be an invoice of goods shipped by John Potter for Kingston, in Jamaica, etc., on account and risk of Messrs. Richard and George Kinkead there, and cartage, wharfage, cooperage and commissions are charged by him to the Messrs. Kinkead. By the bill of lading, the goods are to be delivered to the latter, or to their assigns, they paying freight. It is not denied, that the bill of lading and invoice may be liable to explanation; but as the case is destitute of any proof, except the documents themselves, to show the relation between the consignor and the consignee, the plaintiff

must be regarded as a mere agent purchasing on commissions; and any property he might have had in the goods was divested by the delivery to the carrier, to be transported at the risk and expense of the consignees. If his property in the goods was divested by that delivery, no right of action for them could have remained.

In the case of *Daves v. Peck*, 8 T. R. 330, it was held that the right of action was to be governed by the consideration in whom the legal right to the property was vested. This principle was also adopted in *Evans v. Martlett*, 1 Ld. Raym. 271, and in *Snee v. Prescott*, 1 Atk. 248. The authorities commented upon in 6 East, 23, are decisive to show, that consignors, in the situation of Potter, in this case, cannot bring the action against the carrier. Potter was not answerable for the act of the captain, nor was he liable to the latter for the price of transportation; neither could he receive any injury from the non-delivery of the goods, except so far as it might prejudice his right to stop *in transitu*. The consignees were liable to him for the price of the goods, whether they arrived or not, and for aught that appears by the case, he may already have received of Messrs. Kinkead, the invoice amount. Nothing has been disclosed to show that he has received any damage in consequence of being deprived of the power of stopping *in transitu*, or that any necessity existed for the exercise of that right. Even if his equitable lien, or right of stopping *in transitu*, were destroyed by the act of the master, yet I very much question whether the remedy therefor would be upon the contract; as I am inclined to think redress for that injury must be sought in a special action on the case, or in an action of trover. Inasmuch, then, as Potter could not have recovered the amount of the bill of lading and invoice, in the original action against Briggs, damages ought not to have been allowed him in this action, on that account. I am of opinion, therefore, that a new trial must be awarded, with costs to abide the event of the suit.

THOMPSON, J. The principal question arising out of this case is, whether Potter, the plaintiff in this action, could have maintained an action against Briggs, on the bill of lading signed by the latter. To say that he could not, appears to me so repugnant to the general rules of law relative to the rights of parties arising out of special contracts, that I should require the most unequivocal and binding authority to lead me to adopt such a conclusion. The bill of lading specified that the goods were shipped by Potter, and were to be delivered to Messrs. Richard

and George Kinkead, at Kingston, Jamaica, or their assigns, they paying freight. It is true the invoice stated the shipment to be for account and risk of the Messrs. Kinkead. But the master's contract, by his bill of lading, was made with Potter; and the stipulation on his part was to deliver the goods to the consignees, they paying freight; and it does not, I think, lie in his mouth to call in question the right of property, as between consignor and consignee. There appears some little confusion and contradiction, in the reported cases and decisions on this subject. In the case of *Evans v. Martlett*, 1 Ld. Raym. 271, it appears to be laid down as a general rule, that if goods be consigned by bill of lading to A., he is the owner, and must bring the action against the master of the ship, if the goods be lost. The same rule appears to have been adopted in the case of *Dawes v. Peck*, 8 T. R. 330, and the court there seem to think the right of action vested in the party who was to pay the freight, whether it be consignor or consignee.

Lord Kenyon says the only case where the consignor can maintain the action, is where he is answerable for the price of the carriage. Yet, in the case of *Moore et al. v. Wilson*, 1 T. R. 759, the payment of the price of carriage was not considered the criterion by which to determine the right of action. The action there was by the consignor against the carrier, and it was alleged in the declaration that the plaintiffs were to pay for the carriage of the goods; but on the trial it appeared that the consignee was to pay. Mr. Justice Buller nonsuited the plaintiff, but the nonsuit was afterwards set aside, and Buller said he had been mistaken in a point of law; for whatever might have been the contract between the vendor and vendee, the agreement for the carriage was between the carrier and the vendor. And in the case of *Davis & Jordan v. James*, 5 Burr. 2680, the consignors were permitted, on the trial, to maintain their action against the common carrier. The plaintiffs recovered, and on a motion for a new trial, it was urged that the consignee only could maintain the action; but Lord Mansfield said there was neither law nor conscience in the objection. The vesting of the property may differ according to the circumstance of cases, but it does not enter into the present question. This is an action upon the agreement between the plaintiffs and the carrier. The plaintiff was to pay him; the action is properly brought by the person who agreed with and was to pay him. If the payment of the freight be an immaterial circumstance in determining the right of action upon the bill of lading, according to the de-

cision in the case of *Moore et al. v. Wilson*, before cited, then the case of *Davis & Jordan v. James* goes the full length of giving the consignor a right of action, founded on the agreement contained in the bill of lading. That the payment of freight cannot affect the rights of the consignor, appears to me manifest, that is a matter of arrangement between the consignor and consignee; and the reason why, by the bill of lading, according to the usual course of business, the consignee is to pay the freight, is because none is due until the delivery of the goods. Upon the whole, considering the contradictions that appear in the books on this question, I think it more analogous to the general rules of law applicable to contracts, to adopt the decisions which give a right of action to the party with whom the contract was made; and must still retain the opinion, expressed by me upon the trial, that Potter had a good cause of action against Briggs upon the bill of lading.

With respect to my having misdirected the jury, in telling them that if the sheriff had been, in their opinion, guilty of fraud in making the return he did on the writ, it was matter of aggravation, I have only to observe, that if the idea communicated to and received by the jury, was that they might give what is commonly called smart-money, beyond the actual damages of the plaintiff, it was undoubtedly incorrect. But I am satisfied that no such idea was communicated by me, or understood by the jury; for they had just been told that they might give the plaintiff's whole demand, or less, according as they should judge that the circumstances of the case would warrant, but there is nothing that will afford the inference that they were told they might give more. Nothing more could have been understood by the expressions used, than that if the sheriff had been guilty of fraud in making the return, he must have done it with a view to defeat the plaintiff's remedy against him for the escape, and could not, therefore, stand before the jury in a very favorable point of view. The amount of the verdict shows that the remarks had not much influence on the jury in estimating the damages.

My opinion, therefore, is, that a new trial ought not to be granted.

LIVINGSTON, J. The contract to deliver the goods having been made with Potter, must confer on him a right of action for their non-delivery. It would be without example to deny a party, to whom an express promise is made, whether as trustee, or in his own right, a remedy for its violation. This would pro-

duce the singular case of a party having a right to break an engagement, without responsibility to him with whom it is made, merely because it is possible some other person may have a remedy against him; or, what would be more strange, it would make the very act which consummates the bargain between the shipper and master, that is, the delivery, destroy the remedy of the former on the contract. To whom the goods belong is of no importance, if it be once conceded, which cannot be controverted, that the right of property may be in one, while another, by express agreement, may have a remedy for some negligence or misconduct in relation to it. Whatever, therefore, may have been the right of the consignees in this instance, Briggs cannot contest that of the plaintiff, founded, as it is, on his own written agreement. Nor can any one be injured by a right of action, for the same wrong, subsisting in different persons at the same time (which, however inconvenient, must sometimes happen), as a recovery by one will always bar the other's claim. But a right to sue the master is not only matter of express contract here, but were it necessary or proper to look beyond the agreement itself, I should say that it was a valuable one, conferred on the plaintiff by the bill of lading (not one which he held merely as trustee), and which we ought not to deprive him of, under an idea of the owner being changed, as soon as the goods are put on board. That the plaintiff had a right of stopping them *in transitu*, in case of the bankruptcy of the consignees, is conceded. From this will necessarily follow the right of suing the master in the same event, in case of a delivery to the consignees after notice not to make it, or for an indemnity for any misconduct on his part. If he could not, on such occasion, use his own name, it is not probable the bankrupt's assignees would give him an authority to sue in theirs; so that, were the master ever so solvent, he would lose all recourse against him, and be obliged to come in under the commission against the consignees. In *Davis & Jordan v. James*, 5 Burr. 2680, and in *Moore and others v. Wilson*, 1 T. R. 659, the right of a consignor to sue a common carrier is well settled; though in the first of these cases some stress be laid on the consignor's paying the carrier, the true ground, which is there taken, and the one on which it ought to be placed, is that of the agreement. To determine in whom the right of action is, it is better to look to the party to whom the promise is made, than to the person from whom the consideration may proceed. None of the more recent cases, cited by the

defendant, impair these authorities. That of *Dawes v. Peck*, 8 T. R. 830, which looks a little that way, recognizes them both; and Buller takes particular notice that in those cases there were special agreements between the carrier and consignors, which did not appear in the case then decided. I take no notice of several other cases that were cited, because they only relate to the question of stopping goods *in transitu*, and are wholly impertinent to the one before us.

Another point relates to the damages, which are said to be excessive. On the proofs before the jury, I should not have agreed to so large a verdict. But they were the proper judges of Briggs's circumstances, and if they thought him able to pay, the sum they have given is not extravagant, it being about one-half of plaintiff's demand against him. I can hardly suppose the jury gave larger damages on account of the sheriff's false return. The motion, therefore, for a new trial must be denied. On the other point, I concur in the opinion with Mr. Justice Tompkins.

KENT, C. J., and SPENCER, J., concurred in the opinion delivered by Mr. Justice TOMPKINS.

New trial granted.

In regard to the rule as to the measure of damages in this case, it is seen all the judges concur; and its authority on this point is well recognized: See *Metcalf v. Stryker*, 31 N. Y. 256. Sedgwick on Damages, p. 512, *et seq.*, discusses this subject at length, and gives this as the leading American case on the subject. As to the point of a right of action against a common carrier, it is laid down as sound doctrine, that the action should be maintained only by the person who has the right of property: Angell on Common Carriers, sec. 497. This author says: "But by the delivery of the goods to a carrier on behalf of the consignee, and if they have been placed at his absolute disposal, and no other fact appears, the legal presumption is that he is the true owner, and the property in the goods then becomes immediately vested in him; and, therefore, in the event of a loss, he, and not the consignor, must bring the action, for the consignor has his remedy against the purchaser." In *Everett v. Saltus*, 15 Wend. 474, the court cites the principal case, and lays it down, that the true test is the ownership of the goods, to determine who should bring the action against the common carrier. The doctrine has been fully recognized in a case of much importance in New York: *Thompson v. Fargo*, 40 N. Y. 188, where it was held that to sustain an action against a common carrier for a failure to deliver goods, the plaintiff must be the owner thereof or have some special interest in them. This doctrine was laid down also in *Greene v. Clarke*, 12 N. Y. 352, where the principal case is cited.

SCHMIDT v. THE UNITED INSURANCE COMPANY.

[1 JOHNSON, 249.]

A BLOCKADE A PERIL WITHIN A POLICY.—If the port of destination be actually blockaded, the insured may abandon as for a total loss. The interdiction of commerce by means of the blockade is a peril within the policy; and going to another port subsequently to deliver the goods, will be considered, after the abandonment, as done for the benefit of the insurer. The acceptance of the goods at another port by the consignee, under such circumstances, is for the advantage of all concerned, and will not prevent a recovery for a total loss on the abandonment.

ACTION on a policy of insurance dated July 5, 1803, on thirty-five bales of cotton on board the American ship *Orozimbo*, at and from New York to Hamburg. The following facts appeared: On the arrival of the ship on soundings, in the English channel, she was boarded by an officer of a British man-of-war, who informed the master of the *Orozimbo* that the Elbe was blockaded, and indorsed one of his papers, forbidding him to proceed thither. When off the Isle of Wight, she was again boarded by an officer of another British man-of-war, who indorsed the register, and forbade the master of the *Orozimbo* to go to Hamburg, on penalty of being made lawful prize; but advised him to proceed to Portsmouth to await orders from the owners. The master of the *Orozimbo* accordingly went into Spithead, where he received a letter, dated August 29, 1803, from one Wilson, agent of the ship-owner, advising him "to go to Embden, as the nearest neutral port to Hamburg." The ship arrived in the road of Embden the ninth of September, and the master gave immediate notice to the owner in Hamburg, but received no orders to unload the cargo until the twenty-third of September. The cargo was regularly delivered in good order at Embden; the bills of lading were discharged by the consignee's agents, and forwarded to the ship-broker at Hamburg, who collected the freight. A general average was settled at Embden for injuries to the ship received there during a severe gale, and for expenses incurred by going to England. Evidence that it was generally known in New York that the Elbe was blockaded at the time the *Orozimbo* put into Spithead, was introduced, though objections were made to its admission; and a witness testified that he received a letter from his correspondent in Hamburg, in the autumn of 1803, stating that that place was blockaded, which fact witness thought was generally known in New York.

Plaintiff claimed for a total loss, and also fifty-seven dollars

and ninety cents, his proportion of the general average paid at Embden. The jury, under the direction of the judge, found a verdict for the plaintiff on the first count for a total loss; and also on the count for money laid out and expended, for the amount of the average loss. On the third count, for money had and received, the jury found for the defendants.

Hoffman and Harison, for the defendants. 1. There was not sufficient evidence to show that Hamburg was blockaded; but admitting that fact, there was no loss, within the terms of the policy; *Hadkinson v. Robinson*, 3 B. & P. 388. Mere apprehension of a blockade will not justify the insured in leaving his course. There must be a blockade in fact: *Vos v. United Insurance Co.*, 2 John. Cas. 180; *Williams v. Smith*, 2 Caines, 11 (2 Am. Dec. 209). But the voyage was not lost, as the insured may go to the nearest port he can reach in safety, if prevented from reaching the place of destination; and the acceptance of the cargo at Embden is conclusive against the plaintiff. As the declaration was for a total loss, evidence of a partial loss at Embden ought not to have been admitted. The claim for a general average cannot be supported; there is no evidence that the plaintiff laid out any money.

Radcliff and T. L. Ogden, for the plaintiff. Being turned away from a blockaded port by a belligerent is a peril within the policy: *Marshall*, 237, 434; *Park*, 24; 2 *Molloy*, c. 7, s. 7; *The Henrick and Maria*, 1 Rob. 148. There was sufficient evidence of a blockade in fact. The voyage was defeated and lost; the right to abandon in case of an embargo is not doubted: *Goss v. Withers*, 2 Burr. 683; *Roach v. Edie*, 6 T. R. 413; and the peril in this case is equally a just cause of abandonment. The consignee is the agent of the shipper to receive the goods at their place of destination; by receiving them elsewhere he became the agent of all the parties concerned. The adjustment of the general average by a competent tribunal at Embden ought to be binding here.

THOMPSON, J. The first question presented by this case is, whether a loss of the voyage, by reason that the port of destination was blockaded be a peril within the policy; and, if so, whether the evidence of Hamburg being blockaded was sufficient.

The insurance was on thirty-five bales of cotton on board the ship *Orozimbo*, at and from New York to Hamburg. This was not an illicit trade, and the assured, according to the general

laws of trade, had a right to make his calculations for a sale of the shipment at the port of destination; and, for this purpose, insured the arrival of his goods at that port. Our policies are extremely broad and comprehensive, and would seem to embrace every species of risk to which ships and goods are exposed from the perils of sea voyages. The underwriter, by his contract, stipulates that the goods shall not be prevented from arriving at their place of destination by any of the perils insured against. One of those perils is the restraint of princes. In the present case there was, I think, a total failure and loss of the voyage by a peril coming within the meaning of the policy, under the term, restraint of princes. By the blockade, the vessel was prevented from going to her port of destination, and if she had proceeded, she would have rendered herself liable to capture and condemnation: for the master to have proceeded to Hamburg when it was in fact blockaded, would have been a violation of his duty. The evidence offered with respect to Hamburg being blockaded, was, I think, competent and proper to be submitted to the jury. So far as the protest of the master went, it was the best possible evidence, and tended to show an actual existing blockade; and the general understanding in New York on the subject was certainly a corroborating circumstance. These were submitted to the jury as the testimony from which they were to determine whether Hamburg was in fact blockaded. If a blockade be a risk within the policy, and Hamburg was in fact blockaded, the assured was not bound to accept the cargo at any other place; and unless there had been some acts on his part that will amount to an acceptance, he is entitled to recover from the underwriters for a total loss. The voyage being thus broken up, it was the duty of the master to do what, under the circumstances of the case, was best and most advantageous for the interest of the concerned. His object in going to Spithead was to obtain advice from the agents of his owners. And it was by his advice that he went to Embden, as being the safest and nearest port to Hamburg. The cargo, it is true, was accepted by the consignee at Embden; but this I consider not within the scope of their authority, so as to be binding upon the assured. The consignee, in this transaction, must be considered as a mere volunteer, and acting for the benefit of whomsoever it might concern. Perhaps, however, the acceptance ought not to be deemed a voluntary act on his part, for he urged that the goods might be sent to Lubeck, which was absolutely refused by the master and owner of

the ship. Nothing appears to show that the proceeds of the cargo have come into the hands of the assured, or that he has done any act whatever ratifying the conduct of the consignee. I, therefore, see nothing to preclude him from a recovery as for a total loss. The sum allowed as a general average must be rejected.

LIVINGSTON, J. The effect of an interruption by blockade, that is, whether it be a peril insured against, is the first point in this cause.

Without having recourse to the sweeping clause of "all other perils, losses and misfortunes," which by Molloy and some others, is supposed to "insure against heaven and earth, and to embrace every detriment that can possibly happen to the thing insured," it appears to fall within the risk of restraint of princes, or of "men of war." It is by the latter, that a blockade is formed, and if they prevent the safe arrival of the vessel, or turn her away, how can it be said that the voyage has not been defeated by a hazard insured against? It is not like a denial of entry, for that happens after arrival, and if accompanied with no restraint or detention, cannot amount to a loss; unless the assurer be considered, in all cases, as warranting a right to sell the cargo, whatever may be the laws of the country to which the property is sent. But it is insisted that the *Orozimbo* had a right to proceed, and should have gone on until she met with the investing squadron, and had been turned away. That American vessels under the treaty of London, have the right of proceeding, until turned away in this manner, I never doubted, and such has been the decision of the court for the correction of errors; but this is not the only inquiry here. Properly to estimate the risk of proceeding, after the indorsement, which was made on her register, we must look at the construction which the high court of admiralty of Great Britain has put on this part of the treaty.

The Columbia, 1 Rob. Ad. Re. 154, a case well known in this court, was captured without any previous warning, and condemned by Sir William Scott, because the blockade of Amsterdam was known in New York at the time of her sailing. On ground then somewhat resembling this, if not stronger, might the *Orozimbo* have been condemned, if she had gone on, after receiving advice of the blockade from two ships of war both at no great distance from Hamburg, though not of the blockading squadron. It is sufficient to justify the master's conduct, in cases of this kind, if he have good reason to apprehend that a

capture will be the consequence of going on. "A just fear," says Targa, chap. 59, 291, "is a kind of violence, so that abandonment of a vessel from a doubt of not being able to resist, and especially of being made a slave, is a loss within the policy." And Casaregis, Disc. 23, N. 84, after observing, that in such case, "a captain should not rashly forsake his ship," adds, that "it is otherwise if the circumstances are such as may excuse fear, credulity, or even an error of the captain:" "*Secus si talibus circumstantiis, quae timorem, credulitatem, aut errorem, capitanei excusare possent.*" Emerigon, vol. 1, 509, also mentions several instances in which fear of a shipwreck, an enemy, pirates or the like, which appeared just at the time, though not in fact well founded, have justified a dereliction of the property. These principles, which appear reasonable, apply to the *Orozimbo*, if we once admit that capture is a peril insured against. If the master, from the notification he received, and the advice given him, were really afraid of condemnation, if he attempted to enter the Elbe (and such were certainly his apprehensions, nor were they without foundation), he was not bound to proceed. If he had proceeded, and a loss had ensued, he would have been censured, and have furnished a better ground of defense than is now taken. I am presuming the port of destination to be actually blockaded, which sufficiently appears to have been the case with Hamburg, for all the parties, on or near the spot, acted on that supposition.

But if it were proper in the master to change his route, he ought, it is said, to have gone to the next nearest port, the voyage not being thereby lost, and the insurance would have protected him thus far. This is not so; the moment a voyage is interrupted by a blockade, a right to abandon exists, and if it be seasonably followed up, everything that is afterwards done in good faith by the master, must be on account of the underwriters. The assured are not obliged to receive their goods at the next nearest port, or at any other port than the one to which the vessel was bound. They have calculated on a particular market, and if impeded in getting thither, a loss of the voyage has happened, and the property may be cast on the insurers. As to the captain, he acted for the best; nor ought a receipt of the cargo by the consignees to prejudice any one. This was an act in which the ultimate owner, whoever he might be, had an interest, and it should not be turned to the disadvantage of parties at a distance, who could not give any new orders respecting it. The only point determined in *Hadkinson*

v. *Robinson*, 3 B. & P. 389, is that if a perishable cargo be sold at a loss, at an intermediate port, in consequence of advice received during the voyage, of the port of destination being shut by the government of the country, it is not a total loss within the policy. This decision must have proceeded on the ground that an insurance does not guaranty a right of entry, or to trade; but if Naples had been blockaded, the court of common pleas, without violating any principle it adopted in that case, might have come to a different conclusion.

My opinion is that the verdict is right, except as to the sum included in it for the average loss settled at Hamburg. As this must already have been paid by the consignee out of the proceeds of the goods; that is, out of a fund belonging to the defendants, it ought not to be recovered in this suit; the plaintiff, therefore, must deduct fifty-seven dollars and sixty cents from his verdict, and enter judgment for the balance.

KENT, C. J. The first question that arises in this case, is as to the sufficiency of the evidence of the actual blockade of Hamburg, in August and September, 1803. This testimony consisted: 1. In the notice of the fact given to the captain by an officer of one of the British ships of war, after the vessel had arrived on soundings near the English channel, with a prohibition to proceed there; 2. In the like notice and prohibition given him by an officer of another ship of war off the Isle of Wight; 3. In a letter written to him from London on the twenty-third of August, 1803, by Thomas Wilson, agent of the owner of the ship, who stated to him the fact, and advised him to go to Embden; 4. In a letter from William Boyd, the owner of the ship, dated at Hamburg, the third of September, 1803, and addressed to the captain at Embden, in which the fact seems to be necessarily implied; 5. In the testimony of a witness at New York, who stated that he received information from Bremen that Hamburg was blockaded in the fall of 1803, and he supposed it was so generally understood and known at New York. This evidence was, in the first instance, sufficient for the jury to infer the existence of a blockade at the period in question, as the defendants did not attempt to meet or destroy it by counter testimony, the verdict ought not now to be questioned on account of the insufficiency of that evidence.

The next and more important question is, whether a blockade of the port of destination be a peril within the policy. The only case in the English books that appears to have a bearing on the question, is that of *Hadkinson v. Robinson*, 3 B. & P.

389. The court there considered that the port of destination being shut, was a peril acting collaterally only, and not directly upon the subject. But that case arose upon the special memorandum in the policy, which requires a peril operating to the total destruction of the article insured. It is not an authority beyond a question arising upon that memorandum; for with respect to the loss of the voyage, by reason of a blockade of the port of discharge, the peril operates as directly as any other restraint or detention. The interdiction of commerce with the port of destination is stated by Emerigon, vol. 1, 542, to be a peril of the sea, and if it happens after the risk commences (as we are to intend it did in the present case), the insurer is responsible for the consequences of it; but if it existed before the commencement of the voyage, the contract is dissolved. In a question upon which the English books and decisions are silent, and when the opinion of Emerigon is founded, not upon local ordinances, but upon general principles of insurance, I cannot but consider him as a great authority. Nor do I see why a blockade should not be deemed equivalent to any other restraint or detention. It answers the description of a peril as understood in a policy, and which includes every peril arising from a *vis major*, which could not be resisted, or from a *cas fortuit*, which human prudence could not foresee. It equally interrupts and destroys the voyage. Liberty to go to another port is changing the mercantile adventure, and is nothing less than the compulsory institution of a new voyage; for if the *termini* of the voyage are changed, the identity of the voyage is lost.

I do not consider the act of the consignee in receiving the goods at Embden as binding upon the plaintiff; for as he received them there in consequence of the peril, it was an act of necessity; and he received them as agent for the party in whom the interest should vest, according to the course of events.

It appears, then, to me, that the blockade in fact being established, the captain was forced out of his voyage by the peril; that his conduct in going to England, and from thence to Embden, arose from necessity, and was guided by the best advice and the best discretion that the circumstances of his case afforded; and the abandonment having been duly made, the plaintiff is entitled to recover as for a total loss. As to the further sum, found by the verdict, for the gross average, it cannot be admitted. We have allowed, 1 Caines, 284, 450, after a recovery for a total loss, a further sum for expenditures in

laboring to save the property, under the special agreement in the policy, but we have gone no further. That sum must be deducted from the verdict.

SPENCER, J., delivered a dissenting opinion.

TOMPKINS, J., concurred with Spencer, J.

Judgment for the plaintiff.

JACKSON v. BROWNELL.

[1 JOHNSON, 267.]

BREACH OF COVENANT IN LEASE.—A lease contained the covenant that “in case the lessee should suffer or permit more than one family to every hundred acres, to reside on, use or occupy any part of the premises, the lease should be void,” etc. It was held that letting parts of the premises to persons for a year to cultivate for shares, constituted such persons tenants; and there being more than one such tenant to each hundred acres, the lease became thereby void. Persons occupying the land in this manner have an interest in the land, and are not mere laborers or servants of the lessee.

EJECTMENT. Plaintiff produced, in evidence, a lease, dated March 15, 1794, of two hundred and forty-eight acres, the premises in question, for the term of twenty-one years, executed by Alexander Colden, deceased, in favor of Ebenezer Wilson. The lease contained the following condition: “That in case the lessee, his executors or administrators, should suffer or permit more than one family or tenant to every one hundred acres, to reside on, use, or occupy any part of the said premises, that then and in such case the said lease should be void, and the estate thereby created cease and determine.” By agreement indorsed on the lease, seventy acres were reserved to the lessor for a wood lot. The plaintiff’s lessors were the heirs of Colden; the defendant claimed under S. & R. Pecham, assignees of Wilson. The action was for an alleged breach of the condition.

The facts appear from the opinion of the court, before whom the cause now came upon a motion to set aside a nonsuit.

Van Vechten, for the plaintiff.

Woodworth, attorney-general, for defendant.

THOMPSON, J. I think the number of tenants is restricted to two; no number beyond that will comport with the terms of the lease. The clear import of the restriction is that there

shall not be more tenants than so that each one may have one hundred acres of land; and if so, it appears to me to result, as a mathematical certainty, that two hundred and forty-eight acres will admit of only two tenants. The given number of acres being divided by one hundred, the quotient will designate the number of tenants. It is true that courts have always held a strict hand over conditions for defeating leases. But when parties have made express stipulations, which, in my judgment, will admit of but one interpretation, not to give effect to them would be making a new contract for parties, instead of construing that they have made for themselves.

How many families or tenants, then, within the meaning of the lease, have been permitted, at the same time, to use and occupy the premises? I think, clearly more than two. David Hughes and William Butler resided upon the premises with their separate families, and improved separate parts of the land. They held under Reuben and Seth Peckham, who were the assignees of the lessee, and the agreement between them was, that Hughes was to have half of Reuben Peckham's part, and Butler half of Seth Peckham's part for one year, the Peckhams retaining the residue; by this means the premises had at least four separate and distinct occupants, independent of Hall, who was permitted at the same time to sow a distinct part of the land with wheat. The compensation to be made to the Peckhams for the use of the land, being stipulated to be a portion of the produce raised, must have the same effect as if the rent had been reserved in money: Woodfall, 122. The provision in the lease was doubtless to guard against having too great a proportion of the land plowed and sowed the same season, and to prevent the waste of timber for fire wood; and in this point of view, the restriction must be considered for the benefit of husbandry. The manner in which the premises have been occupied and used is, I think, clearly against the terms of restriction contained in the lease, as well as against what must have been the meaning and intention of the parties. My opinion, therefore, is that the nonsuit should be set aside, and a new trial granted.

LIVINGSTON, J. There is nothing unreasonable in this condition, and if there were, it is not for us to disregard it on that account, the lessee having chosen to submit to it. We have only to inquire, whether it has been broken? The quantity of land leased, about which there appeared to be some dispute, was admitted in the argument to be two hundred and forty-

eight acres; for, though the landlord had a right to cut wood on seventy acres, they were to be considered as among those demised, subject only to his privilege. There existed a right, then, in the lessee and his assigns to have two tenants or families on, or using the premises, at any one time, if not three, but no more. The *gravamen*, or breach relied on, is that the two Peckhams, Hall, Hughes and Butler, making five in all, used the land at the same time.

Hughes and Butler took under the Peckhams, who were then owners of the lease. The first had half of Reuben Peckham's, and the other the same proportion of Seth Peckham's part, the Peckhams reserving the residue to themselves, and which, of course, they must have used as their own. Without taking any notice of Hall, the land, during this year, was used by at least four tenants. It is of no importance on what terms Hughes and Butler took the land, whether on payment of money, or on a partition of its produce between them and the Peckhams, which is not an uncommon way of letting farms in the country. The only question is, whether they were tenants, or barely servants, under the Peckhams. Each had every character of a tenant, and not of a mere laborer for the owner of the soil. They took under a contract to possess for a year; they occupied the same house; they had an interest or estate in the land; they paid rent in grain; they might bring their own cattle on, and reap what they pleased from it, for their exclusive benefit, except grain, which was to be divided; and, what is very important, they had a right (it not appearing they were restrained by special agreement), to the use of wood for burning, repairing, etc., and if they continued in possession, by mutual consent, after the end of the first year, a tacit renovation of the original contract would have been implied, and they could not have been dispossessed without half a year's notice to quit: *Flower v. Darby*, 1 T. R. 159. Very different is the condition of a person who is hired for a few days, to plow or reap a particular field, on having part of the produce. He enjoys none of these privileges, and can do the land no injury, except in the mere working of it, to which the original lessee and his assigns must be entitled to any extent. They might hire a hundred laborers, but could not divide the farm into as many shares, and grant to as many persons a right to pasture cattle, to cut wood, etc., for a whole year, as was granted to Hughes and Butler, without a palpable violation of the condition or rendering it a nullity.

My opinion, then, is, that at the time we are speaking of, there were four tenants in the use and enjoyment of those premises: the two Peckhams, with Hughes and Butler; that the plaintiff was entitled, on this evidence, to a verdict; and that the nonsuit, of course, must be set aside, and a new trial had, with costs to abide the event.

KENT, C. J., SPENCER, J., and TOMPKINS, J., concurred.

Nonsuit set aside, and a new trial granted.

DEFREEZE v. TRUMPER.

[1 JOHNSON, 274.]

WARRANTY OF TITLE.—In a sale of personal property there is an implied warranty in respect to the title of the vendor; but it is otherwise as to the quality or soundness of the thing sold.

CERTIORARI, from which it appeared that Trumper had brought an action of trespass on the case against Defreeze, to recover damages for the sale of a horse, the title to which was afterwards proved to be in a third person. Defreeze sold the horse to Trumper, as executrix in her own wrong, and the administrators of the estate of the intestate recovered the value of the horse against the vendee, in an action of which Defreeze had notice. Trumper recovered judgment for damages and costs; and the principal objection now considered by the court was, that the declaration did not sufficiently aver, nor the evidence establish, any warranty or fraud in the sale.

The case was submitted without argument.

Woods, for the plaintiff in error.

P. W. Radcliff, contra.

By Court. We are of opinion that an express warranty was not requisite, for it is a general rule that the law will imply a warranty of title upon the sale of a chattel. This rule is laid down in the Commentaries of Sir William Blackstone, who says, vol. 2, 451: "That by the civil law, an implied warranty was annexed to every sale, in respect to the title of the vendor; and so, too, in our law, a purchaser of goods and chattels may have a satisfaction from the seller, if he sell them as his own, and the title prove deficient, without any express warranty for that purpose. But with regard to the goodness of the wares so purchased, the vendor is not bound to answer, unless he expressly

warrants them to be sound and good, or unless he knew them to be otherwise, and hath used any art to disguise them; or unless they turn out to be different from what he represented them to the buyer." The present decision does not, therefore, interfere with that of *Seixas v. Woods*, 2 Caines, 48 (2 Am. Dec. 215), for the question in that case arose upon the quality, and not upon the title of the chattel sold, and the two cases are discriminated by the distinction taken by Blackstone.

Judgment affirmed.

LIVINGSTON v. BISHOP.

[1 JOHNSON, 290.]

JOINT TRESPASS, RECOVERY.—Where separate suits are brought against several defendants for a joint trespass, a separate recovery may be had against each; but the plaintiff can have but one satisfaction, and he may elect *de melioribus damnis*, and issue his execution therefor against one of the joint trespassers.

ACTIONS of trespass were brought separately, against Bishop and five others, his servants, for a joint trespass. Pending the actions, it was agreed that Bishop should be answerable for the whole trespass; and in case a verdict should be found against him, and this court should be of opinion that the plaintiff would be entitled to costs in the other suits, after a trial and recovery against Bishop as a joint trespasser, for the whole damages, then the other defendants were to pay the costs of their respective suits, otherwise not. A verdict was found against Bishop, on which judgment was entered up, and execution issued and satisfied.

The case was submitted without argument.

KENT, C. J. On looking into the books, with a view to this question, I was surprised to meet with so much contradiction and uncertainty on the subject. The cases are not all capable of being reconciled to each other, and some of them appear to me not reconcilable with reason. It is, however, a proposition that is not controverted, but everywhere admitted, that for a joint trespass, the plaintiff may sue all the trespassers jointly, or each of them separately, and that each is answerable for the act of all. It would seem to result from this doctrine, that a trial and recovery against one trespasser is no bar to a trial and recovery against another. If there can be but one recovery, it is in vain to say that the plaintiff may bring separate suits, for the cause that happens to be first tried, may be used by way of

plea *puis darrein continuance*, to defeat the other actions that are in arrear. The more rational rule appears to be, that where you elect to bring separate actions for a joint trespass, you may have separate recoveries, and but one satisfaction; and that the plaintiff may elect *de melioribus damnis*, and issue his execution accordingly; and that where he has made this election, he is concluded by it, and that if he should afterwards proceed against the other defendants, they shall be relieved on payment of their costs. This is agreeable to the rule laid down in Sir John Heydon's case, 11 Co. 5, where, in trespass against several, one appeared and pleaded not guilty to a declaration against him, with a *simul. cum, etc.*, and afterwards, another appeared and pleaded not guilty to a like declaration, whereupon separate venirees issued, and the issues were separately tried, and separate and different damages assessed, and the court resolved that the plaintiff had his election of the different damages assessed, which should bind all, and that there should be but one execution.

The case of *Brown v. Wotton*, Yelv. 67; Cro. Jac. 73; Moore, 762, stands, however, opposed to this view of the subject, and it merits some attention. That was an action of trover for certain goods, and the defendant pleaded a judgment and execution in behalf of the plaintiff, against one I. S., for the same goods, and the plea was held good. The court took a distinction between a demand and a recovery of a thing certain, and of a thing uncertain; and they held that, in the first case, as where two are bound, jointly and severally, in a bond, a recovery and execution against one was no bar against the other, without satisfaction; but where the demand rests only in damages, as in trespass, a recovery and judgment against one was a bar against the other, for the uncertain demand is now made certain by the judgment, and the plaintiff shall not resort to the uncertain demand again. In this case there was a judgment and execution in the first cause, and so far, therefore, as the opinion of the court goes to declare that a judgment alone constituted a bar, the opinion was extra-judicial. The principle, however, which the court went upon, between a demand for a thing certain and a thing uncertain, applied equally to both cases; and yet, afterwards, in the case of *Claxton v. Swift*, 3 Mod. 86; 2 Show. 484, which was an action of *assumpsit*, and, according to the forms of law, equally sounding in damages, the court held that a recovery without satisfaction against the drawer was no bar to a suit against the indorser of a bill. The

principle of the first case may be considered, therefore, as in some degree shaken by this latter decision; for, in the language of the case of *Brown v. Wotton*, "the thing uncertain is, in both instances, made certain by the judgment, and altered and changed into another nature."

This case of *Brown v. Wotton* was clearly introductory of a new rule. It is laid down in *Brooke, Judgment*, pl. 98, that if two commit a trespass, I can have several actions against them, and recover the entire damages against each, and have execution; and one defendant cannot plead that the plaintiff hath recovered against the other for the same trespass, and taken him in execution. And in *Morton's case*, Cro. Eliz. 30, it was even made a question by one of the judges, whether a judgment and execution, with satisfaction, against one joint trespasser, could be pleaded by another trespasser; but the court held it reasonable that it should be a bar. And many cases subsequent to that of *Brown v. Wotton* seem to disregard it, and to make the satisfaction against one trespasser the test of the plea. Thus in *Cocke v. Jenner*, Hob. 66, the court held, that if trespassers be sued in several actions, the plaintiff may make choice of the best damages; but that when he has taken one satisfaction, he can take no more, and if he attempt it, an *audita querela* will lie. Again, in the case of *Corbet v. Barnes*, Wm. Jones, 377, the court said, that for one assault the plaintiff can have several actions, and recover; but, when recovery is had against one, and satisfaction, the plaintiff cannot have a second satisfaction, any more than where separate suits are brought upon a joint and several obligation. So late as the case of *Bird v. Randall*, 3 Burr. 1345, Lord Mansfield advanced the same doctrine, and observed, that in case of a joint trespass, the defendants were all liable to the plaintiff, and he might proceed against any or all of them as he pleased, yet he shall have but one satisfaction from them all.

I am, therefore, inclined to question the extent of the decision in *Brown v. Wotton*, and to hold, that a recovery against one joint-trespasser is not alone a bar to a suit against another. There must, at least, be an execution thereon, to bring a case within the facts on which that decision was founded; and that, perhaps, may be deemed an election by the plaintiff, *de melioribus damnis*, and sufficient to conclude him. The trial and recovery in the present case was, therefore, no bar to the other suits which were pending, and I conclude that the plaintiff is entitled, under the agreement, to the costs of the

other suits. In the analogous case of a recovery in separate suits against the drawer and indorser of a note, the costs of both suits were to be paid, *Windham v. Wither*, Str. 515. Our statute, Laws, sess. 24, c. 90, s. 14, vol. 1, 354, allows a recovery of costs in one of the suits only; but this statute was an alteration of the former law, and it does not apply to suits in trespass. The case of *unica taxatio damnorum* is, where the trespassers are sued jointly, and they sever in their pleas, and separate damages are assessed; and the reason of this is, that in judgment of law, the several juries give but one verdict at one time: 10 Co. 117 a; 11 Co. 7 a. There is no case, that I have met with, that requires a single taxation of costs where there are separate suits in trespass, or that excludes the plaintiff from his costs in all the suits in this case, any more than in the case of separate suits on one obligation, antecedent to our statute. The fact annexed to the case, that execution had been issued, and satisfaction received of the judgment against Bishop, is not material, as the present question arises upon the agreement.

The opinion of the court, accordingly, is, that the plaintiff is entitled to his costs in each of the suits, up to the time of the agreement, together with the costs of the present application.

THOMPSON and TOMPKINS, JJ., concurred.

LIVINGSTON and SPENCER, JJ., gave no opinion.

Rule granted.

LARRABEE v. VAN ALSTYNE.

[1 JOHNSON, 307.]

BAR TO DOWER.—A devise was made by a husband to his wife of certain articles of personal property and forty pounds in money, “in lieu and stead of every other claim and pretension to his estate.” It not appearing that the wife had accepted this bequest in lieu of dower, it was held that it was no bar to her right to dower at law.

DOWER. Demandant’s claim was resisted on the ground that by the will of Cornelius Van Alstyne, the late husband of Mrs. Larrabee, she was barred of her dower. The testator bequeathed to his wife certain articles of household furniture, and forty pounds in money, declaring “that this bequest and devise shall be understood in no other sense than to be in lieu and stead of every other claim and pretension my said wife can or may have on my estate.” Thirty-seven pounds had been paid to Mrs. Larrabee, but it was not proved on what account it was paid.

The case was submitted without argument.

SPENCER, J. The bequest to the wife is not expressed to be in lieu or recompense of dower; and it is questionable whether, if such were the expression, and if the collateral recompense had been paid, the heir could have defended himself at law. It is not necessary to decide that point; I consider it well settled, that to bar this claim, the devise must expressly declare the thing to be given in bar of dower: 2 Ch. Cas. 24; 2 Vern. 365; Eq. Cas. Abr. 218, 219. Had the will gone so far, and if even the donation of a sum of money would furnish a defense, yet here the tenant fails, on the ground that the sum given has not been paid. The demandants must have judgment.

THOMPSON, J. The first question that arises is, whether this is to be considered a bequest in lieu of dower. I am inclined to think it must; though the testator does not expressly say that it is to be in lieu of dower, his meaning and intention cannot be misunderstood; he declares it to be in lieu of every other claim and pretension to his estate. To ascertain the intention of the testator is a cardinal rule in the construction of wills, and such intention, when discovered, must be carried into effect as far as is practicable; when it is manifestly the intention of the testator that the devise or bequest to his wife shall be in lieu of dower, she has her election to take either the one or the other, but cannot have both. Whether, in the present case, Mrs. Larrabee did accept the legacy or not, under such circumstances as to determine her election, may, perhaps, admit of doubt; but, admitting her to have made her election, I should not consider it a bar of dower at law. It is, I think, a well-settled rule that collateral satisfaction is not pleadable at law in bar of dower. To render a provision to the wife by will a legal bar of dower, it must consist of lands given or assured unto her for life; but a sum of money, or other chattel interest, given by will in lieu of dower, will, if accepted by the wife, after her husband's death, constitute an equitable bar of dower; and this seems to be the distinction recognized in all the cases on the subject. It is a rule of chancery to give the widow her election to accept of the testamentary provision, or to refuse it, and betake herself to her dower at law; and even to allow her this election after acceptance and enjoyment, for a considerable time, of the testamentary provision, if it appears that she acted without full knowledge and understanding of her true situation and rights, and of the consequence of her acceptance: Co. Litt. 36 b., and Hargrave's Notes; 9 Vin. 249; 1 Eq. Cas. Abr. 218; 2

Bac. Abr. Gwillim's edit. 383, and the numerous cases cited in the notes. My opinion, therefore, is that the plaintiffs are entitled to judgment.

KENT, C. J., was of the same opinion.

LIVINGSTON, J. If the legacy had been accepted, and receipts given in the manner directed by the will, a doubt would hardly be entertained of the widow's being barred of dower, notwithstanding certain *dicta* that such an estate cannot be defeated by collateral recompense. At present it is certain, and it is strange that it should ever have been doubted, if a widow accept of any matter under a will, be it land, money or goods, in lieu of dower, that she is thereby barred; and, in my opinion, this may be pleaded either at law or in equity. The only case which seems to deny this position is *Lawrence v. Lawrence*, 2 Vern. 365. The single point, however, there determined, and even that was reversed, was, that though a devise be not declared to be in bar of dower, yet, if it appear it was so intended, it shall have that effect. The chancellor adds that "a collateral satisfaction may be a good bar in equity, though not pleadable at law." This evidently means that it belongs only to a court of equity to say whether a devise be really made in bar of dower; but if a widow accept it as such, and give a receipt or release, that court has no right to prevent its being pleaded at law. A case of this kind is not to be found; why may not a widow release a right of dower, as well as any other right, and on what consideration she pleases? Whether she receives a cent or more, so that she be not imposed on, is nothing to the purpose. Such releases are every day executed, but I never supposed that their validity could be examined and established only in a court of equity, any more than a bond or other instrument executed by a widow. There can be no risk, therefore, in saying that if a woman acknowledge in writing an acceptance of any valuable consideration whatever in lieu of dower, she shall not afterwards be permitted to sustain a suit for it here.

But the difficulty in this cause arises from the tenant's having no evidence on what account his payments were made, or that they were in full; he ought to have satisfied the jury on these points, and not having done it, the verdict cannot be disturbed.

TOMPKINS, J., concurred.

Judgment for the demandants.

See *Evans v. Webb*, 1 Am. Dec. 308, and *Hamilton v. Buckwalter*, Id. 250. for decisions upon a similar point.

KENNY v. CLARKSON.

[1 JOHNSON, 335.]

INSURABLE INTEREST.—A British vessel was purchased from merchants in Jamaica, but the purchaser being unable to pay the entire purchase-money, it was agreed that she should remain in the name of the original owners, until the balance was paid, when they should give a regular bill of sale. The purchaser took possession, and appeared as owner of the vessel. In an action on a policy of insurance effected on the vessel in the name of the purchaser, it was held that he had an insurable interest.

RIGHT TO INSURE WHEN BOTTOMRY BOND EXISTS.—The owner, although there be a bottomry bond on the vessel, may insure his interest generally, but the holder of a bottomry bond must specially insure his interest.

PROOF OF FOREIGN LAWS.—The common law of a foreign country may be proved by respectable and intelligent witnesses, but foreign statutes cannot be proved by parol.

ACTION on a policy of insurance on the British sloop Betsey, the plaintiff, master, on a voyage at and from Charleston, S. C., to Jamaica, valued at two thousand dollars. The jury found for the plaintiff on the trial before THOMPSON, J. A motion for a new trial was made, from which the following facts appeared:

In December, 1799, the plaintiff purchased of Douglas, Stewart & Minot, at Jamaica, the vessel insured by the defendants, for three thousand dollars, at which time he paid one thousand eight hundred dollars in part. No bill of sale was executed, but it was agreed by the parties in writing, that the vessel should continue in the name of the vendors, who were to deliver the register and a bill of sale to plaintiff when he paid the residue. Plaintiff was in possession of the vessel from the day of the purchase until the time of the insurance and subsequent loss. While on the voyage insured, the sloop was captured by a French privateer, carried to Guadaloupe, and there condemned as enemy's property.

Defendants introduced depositions taken under a commission, to prove that, by the statutes of Great Britain, a British vessel could not lawfully be transferred from one British subject to another, so as to enjoy all the advantages of a British vessel, without a new register in the name of the purchaser. A motion for nonsuit being overruled, defendants then called upon plaintiff to produce two certain instruments, one called a bottomry bond, the other an affidavit of plaintiff, which, having examined, they refused to read in evidence. Plaintiff's counsel then read the documents against defendants' objection; and it appeared that

the plaintiff, on May 24, 1800, had mortgaged the Betsey and her cargo to A. & J. McClure, of Charleston, for one thousand and seventy-five dollars and fifteen cents, advanced by them for necessary repairs and expenses. The instrument contained a clause authorizing the McClures to insure the vessel for two thousand dollars on plaintiff's account, which they were to receive in case of loss; and the insurance was accordingly effected in New York, in plaintiff's name. From the affidavit it appeared that a prior insurance had been made at Kingston for three thousand dollars, which had been paid, and that the vessel cost the plaintiff seven thousand four hundred dollars, including repairs, which was said to be her value.

The judge, in his charge, said that the plaintiff had an insurable interest in the vessel; that, as between the assurer and assured, it was not essential that the transfer of the property should have been according to the forms of the British statutes; that the plaintiff, being the purchaser, and in possession, and having paid the consideration money, had, at least, an equitable interest. But he left it to the jury to decide whether the plaintiff was in possession as master under the former owner, or as master and owner. He further stated, that the right to insure was not taken away by the instrument of bottomry, which, however, was not technically a bottomry bond; that the plaintiff had an insurable interest beyond the amount of the bond; and that the value of the vessel was a question for the determination of the jury; that by the terms of the policy all prior insurances were to be deducted, and the defendants having resorted to the plaintiff's affidavit, in order to show such prior insurance, the whole must be taken together; that though the vessel cost three thousand dollars, it did not appear what was her condition at the time of the purchase, nor what repairs had been made, and she might have been worth much more at the time of the insurance.

The points raised by counsel appear from the opinion.

Pendleton and Harison, for the defendants.

Evertson and Benson, for the plaintiff.

By Court, SPENCER, J. It has been objected that, by the 25th Geo. III, c. 60, the certificate of registry not having been inserted, the bill of sale was utterly null and void. It has also been objected, that the plaintiff having given a bottomry bond to A. & J. McClure, for two thousand dollars, which sum they were authorized to get insured on the vessel, there was no in-

insurable interest but the bottomry. With respect to the effect of the British statute, it is a sufficient answer to observe, that it has been proved only by parol; for though courts of law will receive evidence of the common law from intelligent persons of the country whose laws are to be proved, I think there exist strong reasons against such proof of foreign statutes, and this distinction, undoubtedly, prevails in the English courts. All the evidence in the case shows manifestly that the plaintiff had a reasonable and almost certain expectation of procuring all the muniments necessary to give him a title even under the British statute; he had paid nearly two-thirds of the amount of the purchase-money, he had the full dominion of the vessel, and, according to the cases of *Le Cras v. Hughes*, and *Grant v. Parkinson*, Marshall, 84, 111, 219, his interest, independent of the question arising on the bottomry, was insurable.

That a bottomry interest cannot be insured but *eo nomine*, has been decided in this court; the *McClures*, therefore, could not have been otherwise insured. The case of *Williams v. Smith*, 2 Caines, 14 (2 Am. Dec. 209), is directly against the objection raised here. In that case a vessel was insured after being bottomed, and it was holden that the bottomry did not take away the right to effect an insurance for the owner. The circumstance of ignorance in *Williams* of the giving the bottomry when the insurance was effected, could have had no influence on the question. The plaintiff, then, in my judgment, had an insurable interest.

The opinion I have already expressed on the bottomry, renders it unnecessary to examine the second objection; because I have gone on the principle that there was a bottomry, when, if the paper read by the plaintiff without proof were evidence, there appears to have been none. I must not, however, be understood as sanctioning the course adopted at the trial, in admitting the paper to be read without proof, because notice had been given to produce it, and it had been called for and perused. The case of *Lawrence & Whitney v. Van Horne & Clarkson*, 1 Caines, 276, settles nothing; the then chief justice expressing no decided opinion on the question, and the rest of the court were equally divided. It appears to me that the notice to produce a paper, and calling for its inspection, ought to be considered as analogous to a bill for discovery, where most certainly the answer is not evidence but for the adverse party. I think it our duty to adopt such a course as will not needlessly drive parties into equity for discovery; I mention thus much, that we may not be misunderstood on this point of practice.

I can perceive no impropriety in the judge's charge in saying: "As the defendants, for the purpose of showing such prior insurances, have resorted to the plaintiff's affidavit, the whole of it must be taken together." The soundness of that position has not been controverted; but the counsel suppose that it ought to have been also observed that the jury were not bound to believe that part of it, which stated that the vessel, when she sailed on the voyage insured, was worth, and had cost, seven thousand dollars. If verdicts were to be set aside because the judge, in delivering a charge, omitted comments which might have been proper, there are but few verdicts that would stand the test. It is difficult to believe that the jury could have understood the judge that they were to believe every part of the affidavit; but that they might believe it or not, in their discretion.

With respect to the last point, it appears that there was a prior insurance to the amount of three thousand dollars. The bottomry is stated by Mitchell to be two thousand dollars, and the value of the vessel seven thousand dollars. What was the rate of premiums does not appear. If these sums be added to the probable premiums, there would remain a sufficient sum to warrant this insurance, had it been an insurance on interest. That this was a valued insurance at two thousand dollars, cannot affect the question; the valuation is only conclusive between the parties to this policy. The only evidence that the valuation of this vessel was seven thousand dollars is derived from the plaintiff's affidavit, which, it must be remembered, was read by the defendants to the jury, who, it seems, believed that fact. I see no reason to differ from the conclusions drawn by the jury, and am, therefore, of opinion that a new trial ought not to be granted.

Judgment for the plaintiff.

MUMFORD v. MCPHERSON.

[1 JOHNSON, 413.]

PAROL WARRANTY.—Where the parties to a bill of sale of a ship, reduced their agreement to writing by a bill of sale, it was held that no action would lie on a parol warranty made at the time of sale, and when no fraud was alleged.

ACTION on a warranty on the sale of the moiety of a ship. The case is stated in the opinion of the court.

Bogert and Benson, for the plaintiffs.

T. A. Emmet, for the defendants.

By Court, THOMPSON, J. This is an application to set aside a nonsuit granted at the trial. The warranty alleged to have been made is, that the ship was completely copper-fastened. Upon the trial, the bill of sale was produced, which contained no warranty. The plaintiffs then offered to prove by parol, that one of the defendants, after the bill of sale was executed, and before it was delivered, did, to a question put by one of the plaintiffs, express himself to the effect of the warranty contained in the declaration. The plaintiffs also offered to prove that the defendants, in advertising the ship for sale, had described her as composition-fastened, complete for coppering. This testimony was overruled, and the question now presented is, whether it ought to have been admitted, and was sufficient to maintain the action.

The plaintiffs were rightly nonsuited. It is not pretended that there was any fraud in this case. The action is founded upon a supposed warranty. Had the plaintiffs' claim rested on a deceit in the sale, the advertisement offered might have been admitted, as a circumstance tending to establish the fraud; but it could have no relevancy to the establishment of a warranty that depended upon the contract between the parties. But admitting a parol warranty to have been fully proved, no action could have been maintained upon it. The contract between the parties was reduced to writing, and contained in the bill of sale, and recourse must be had to that instrument to ascertain its extent. It cannot be a safe or salutary rule to allow a contract to rest partly in writing, and partly in parol. Wherever it is reduced to writing, that is to be considered as the evidence of the agreement, and everything resting in parol becomes thereby extinguished. The plaintiffs must, therefore, take nothing by their motion: *Seixas v. Woods*, 2 Caines, 48 (2 Am. Dec. 215).

Judgment of nonsuit.

FOSDICK v. CORNELL.

[1 JOHNSON, 440.]

DEVISE—LIMITATION IN FEE.—A testator, after charging his estate with the payment of a debt, providing for his wife, etc., devised his real estate to his four sons and a daughter, Elizabeth, and then added: "Further, my mind and will is, that if any of my said sons, William, Jacob, Thomas and John, or my daughter Mary, shall happen to die without heirs male of their own bodies, that then the lands shall re-

turn to the survivors to be equally divided between them." It was held that these words did not create an estate tail, but a limitation over in fee to the survivors, on the failure of the male heirs.

TRESPASS. By the pleading the title to the freehold was put in issue, and a verdict taken for the plaintiffs, subject to the opinion of the court on the following case: The *locus in quo* was a tract of meadow and beach known as Rockaway Beach, and formerly belonged to Richard Cornell, under whom both parties claimed. The plaintiffs claimed under the will of William Cornell, son of Richard, as the legal representatives of the devisees of William. The defendant claimed under the will of Richard Cornell, on the ground that the devise to William was in tail. The will of Richard was dated November 7, 1693. The testator first binds his estate for the payment of a certain debt, and directs that if the executors did not pay the debt, that then his estate should be sold for that purpose, and the surplus divided among his four sons. He then devises to his son William and his heirs forever, the premises in question, and after devising other real estate to his other sons and his daughter Elizabeth, in fee-simple, and making provision for his wife and daughter Mary, he adds the following clause: "Further, my mind and will is that if any of my said sons, William, Jacob, Thomas and John, or my daughter Mary, shall happen to die without heirs male of their own bodies, that then the land shall return to the survivors, to be equally divided between them." William, after the death of his father, entered on the premises in question, and afterwards, in 1742, by his will, devised the same to his sons, William and John, in fee. The plaintiffs are, in regard to the premises in question, the legal representatives of William and John; and the defendant and one Smith, mentioned in the pleadings, are the legal representatives in the male line of descent of the heir-at-law of the said William, the elder son of Richard.

The only question between the parties was upon the construction of this clause in the will, and it was agreed that if the court should be of opinion that William, the son of Richard, did not take an estate tail by reason of the devise to him, that then judgment might be entered for the plaintiffs; if otherwise, a new trial was to be granted, with costs to abide the event of the suit.

S. Jones and Riggs, for the plaintiffs.

Hopkins and Radcliff, for the defendant.

By Court, THOMPSON, J. The determination of this question will depend on the interpretation to be given to the devise over to the surviving devisees; if this were to take effect only on an indefinite failure of male issue, William took only an estate tail. But if, from the context, or the whole will taken together, it may be construed to take effect on the failure of male issue, during the life of the first taker, or, as applied to the present case, during the life of William, the devise over is good as an executory devise, and will not in any way affect or qualify the prior clause in the will, wherein a fee-simple is devised to William. This is a question of construction, depending on the intention of the testator; and from the whole will taken together, I cannot entertain a doubt that he meant to provide, that in case any of the devisees named in this clause should die without leaving male issue at the time of his death, his portion should be divided among the survivors. Neither do I think that there is any stubborn or rigid rule of law that will militate against this construction. The cases in the books on this question furnish us with many nice distinctions, all, however, made for the purpose of giving effect to the intention of the testator, which is considered a cardinal rule in the construction of wills. Lord Chief Justice Wilmot said, that he would lay hold of the most trifling circumstance to give effect to the apparent intention of the testator: *Keily v. Fowler*, Fearne's Ex. Dev. 236, 245. In the case of *Pell v. Brown*, Cro. Jac. 590, which Lord Kenyon, in the case of *Porter v. Bradley*, 3 T. R. 146, terms the foundation of, and, as it were, the *magna charta* of this branch of the law, the devise was to Thomas and his heirs forever, and if Thomas died without issue living William, then the devise was over to William. This was considered a devise in fee to Thomas, and not an estate tail; the words living William were thought sufficient to make the devise over to William an executory devise. In the case of *Hughes v. Sayer*, 1 P. Wms. 534, the testator had devised his personal estate to A. and B., and upon either of them dying without children, then to the survivor. This was held a good devise over, for the words dying without children must be taken to be children living at the death of the party, and could not mean an indefinite failure of issue; and the reason assigned was, that the immediate limitation over was to the surviving devisee; and it was not probable, that if either of the devisees should die leaving issue, the survivor would live so long as to see a failure of issue, which in law was such a limitation as might endure forever.

If the reason assigned for the decision in this case be solid, it applies with full force to the one before the court, for here the limitation over is to the surviving devisees. The only difference between the two cases is, that the one relates to personal, and the other to real estate, which, it is contended, requires a different rule of construction, according to the adjudged cases. I find no distinction, however, with respect to the effect which the words surviving devisees, or any other words, or parts of the will, are to have in ascertaining the intention of the testator. It is true that in the case of *Forth v. Chapman*, 1 P. Wms. 667, the lord chancellor thought the words, leaving no issue, ought to receive a different construction when applied to real, than when to personal estate; that as to the former, the words, *ex vi termini*, ought to be considered to mean an indefinite failure of issue, and, as to the latter, a failure of issue living at the death of the first taker. The soundness of the distinction has been much questioned.

In the case of *Porter v. Bradley*, 3 T. R. 145, Lord Kenyon rejected it, and said that it would be very strange if these words had a different meaning when applied to real and personal property. If such a distinction existed in the law, it would not agree with the rule *lex plus laudatur, quando ratione probatur*; but it was not founded in law. In that case, the court decided that if lands be devised to A., his heirs and assigns forever, and if he die leaving no issue behind him, then over, the limitation over is good by way of executory devise. In the case of *Roe v. Jeffrey*, 7 T. R. 589, the devise was very analogous to the present. It was to T. F. and his heirs forever; but in case he should depart this life, and leave no issue, then to return to E. M. and S., or the survivor or survivors of them, to be equally divided betwixt them, share and share alike. This was held a good executory devise, for the testator must have meant the devise over, on failure of issue living at the death of the first taker. The principal reason assigned for this conclusion was, that the devise over was to persons then in existence, and Lord Kenyon here takes an opportunity of observing that he was not prepared to unsay what he had said in *Porter v. Bradley*, respecting the distinction taken in *Forth v. Chapman*. Without, however, expressing any decided opinion relative to the correctness of this distinction, I think it is fairly to be collected from the provisions in the whole will, that the testator in the case now before the court, intended that the de-

wise over should take effect in case the first taker should die without a son living at the time of his death, and that it was not to depend upon an indefinite failure of issue. The former part of the will, in which the premises in question are devised in fee-simple to William, is totally distinct and independent of the clause in question; and though this devise may, by subsequent provisions, be confined and restricted, so as to carry only an estate tail, yet, in order to give it that effect, it ought to appear clearly that such was the intention of the testator. But there is nothing in the whole will, except the particular clause in question, that tends in the least to show that the testator meant to give to his son William an estate tail. He had parceled out his estate among his children as he thought just and right, giving them, in the first instance, a fee-simple interest, which shows pretty clearly what his intention was with respect to the estate he meant to devise. It is most probable, if he had intended to devise an estate tail, that he would have done it in the first instance, and not have left it to be raised by implication. The devise over, also, being to the surviving devisees, among whom was his daughter Mary, to whom he had not in any other way devised any real estate, is another strong circumstance, according to the authorities cited, to show that the clause in question was only intended to provide for the contingency of any of the devisees dying without leaving heirs male living at the time of their death. The opinion of the court, therefore, is that the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

In *Anderson v. Jackson*, 16 Johns. 382, this subject underwent an elaborate examination in the court of errors, and the authority of the principal case was affirmed by the majority of the court. But the minority, in which was Chancellor Kent himself, denied its authority. It is worth observing what was then said by Chancellor Kent. Referring to the case he says: "I was, at that time, Chief Justice of the Supreme Court; and though I did not give the opinion, I will not shelter myself under that silence. I am free to say that I partook of its error. But I should be unworthy of public confidence, if, with more experience and more examination, having detected myself in error, I should now be ashamed to confess it. I discovered years ago that the case of *Fosdick v. Cornell* was decided upon mistaken grounds. The court, however, have this apology for themselves, that without much examination, and without looking, as they ought to have done, deeply into the subject, they were led astray out of the beaten track, by such a distinguished leader as Lord Kenyon." Notwithstanding what is here said, the principal case has received the highest indorsement, both in the federal and New York courts. In *Jackson v. Chew*, 12 Wheat. 163, Thompson, J., after adverting to what was said by Chancellor Kent in *Anderson v. Jackson*,

says: "If this should be admitted (which I certainly do not mean to admit), it is an error which has been repeatedly sanctioned by all the courts of that state for the last twenty years, that it has ripened into a settled rule of law." Its authority is affirmed in *Lippett v. Hopkins*, 1 Gall. 460; *Chrystie v. Phye*, 19 N. Y. 358; *Gilman v. Reddington*, 24 N. Y. 16.

WHEELWRIGHT v. DEPEYSTER.

[1 JOHNSON, 471.]

TITLE OF PURCHASER.—There being no markets overt here, a purchase for a valuable consideration, and without notice vests no higher title in the vendee than was possessed by the vendor, and in the case of a purchase made in a foreign country, the general principle of law applies, unless some local law be shown which would affect the property.

INVALID SALE BY PRIZE COURT IN NEUTRAL TERRITORY.—A sale of captured goods by order of a prize court of the captor established in a neutral country, does not change the title of the property, since such court is without jurisdiction.

JURISDICTION OF PRIZE COURT.—The decision of a prize court of competent jurisdiction, is conclusive as to the ownership of the property, and a court of common law has no jurisdiction of a question of prize, but the inquiry may be made as to the competency of the prize court to give a decree, when a condemnation for prize is set up as a source of title.

TROVER BY JOINT OWNER.—One joint owner of a chattel may bring trover or trespass for his separate interest, and the defendant cannot take advantage at the trial of the non-joinder of the other parties, but must plead it in abatement.

TROVER for a quantity of coffee. The following facts appeared in evidence: The plaintiffs were owners of the schooner *Peggy*, and of a greater part of her cargo, consisting of coffee, in barrels and bags, marked S. P., and with the master owned, jointly, another portion of the cargo, being coffee without marks. The coffee had been purchased by the plaintiffs at St. Marks, St. Domingo, which was at the time in a state of revolt from the French government. On her voyage homeward to the United States, the *Peggy* was captured in February, 1804, by a French privateer, and carried to St. Jago de Cuba. The coffee in question was purchased on account of the defendants, of a Spanish merchant at St. Jago de Cuba, laden on board the *Two Brothers*, whose master knew nothing of plaintiffs' claim, and was received by the defendants in May, 1804.

The defendants offered in evidence the proceedings of the French agency at St Jago de Cuba, and the condemnation of the *Peggy* and her cargo by a French admiralty court at St

Domingo. From documents duly authenticated, it appeared that after a *procès verbal* and examination of the master and mate, a survey of the Peggy was ordered by the French agency at St. Jago de Cuba; and it being reported that the vessel was leaky and her cargo in danger of being spoiled, it was ordered to be sold provisionally, the proceeds to abide the final decision. The Spanish merchant, vendor of the defendants, purchased the whole cargo, and after the sale to the defendants, a sentence of condemnation was passed on the coffee, at St. Domingo, upon a *procès verbal* drawn up at sea, and one at St. Jago de Cuba, the cause assigned therefor being a contravention of the *arrêts* of the French government, as to the trade with the revolted parts of St. Domingo. This evidence was objected to and overruled. Defendant then offered to prove, that by permission of Spain, the French agency at St. Jago de Cuba was empowered to act as stated in the documentary evidence; but this was also rejected. Spain was not at war with any power at that time.

SPENCER, J., charged the jury, that the property of the coffee remained in the plaintiffs and had not been changed, either by the purchase made by the defendants, or by any of the acts and proceedings of the captors, or the French tribunals; that, in ascertaining the damages, they ought to take into calculation not only the coffee exclusively owned by the plaintiffs, but a moiety of that part also owned by them jointly with the master. The jury found a verdict for the plaintiffs accordingly.

S. Jones and Hoffman, on behalf of the defendants, based a motion for a new trial on the following grounds: 1. That the property in the coffee became vested in the defendants by the purchase; that the English doctrine of sales in market-overt, divesting the rights of the original owner was applicable: 2 Bl. Com. 449; 2 Co. Inst. 219, 220; 5 Co. 84; 2. That prize goods may be lawfully sold by the captors in a neutral country with the consent of the neutral power: Bynkershoek Ques. Juris. Publici, lib. 1, chap. 15; Vattel, liv. 3, c. 7, s. 132; Martens on Captures, etc., s. 36; *McMasters v. Shoolbred*, 1 Esp. Cas. 237; 3. That belligerents may, with the consent of the neutral power, carry prizes into neutral ports and proceed against them there for offenses against the laws of neutrality; 4. That a prize in a neutral port may be condemned by tribunals in the country of the captor: *Henrick and Maria*, 4 Rob. Adm. R. 43; *The Christopher*, 2 Id. 209; 5. That a subsequent condemnation was

sufficient to validate a prior provisional sale; 6. That the court erred in rejecting evidence; 7. That this question being one of prize or no prize, belongs exclusively to the prize court: *Le Caux v. Eden*, Douglas, 596, and note; 8. Misdirection to the jury.

Harison and D. A. Ogden, for the plaintiffs. Counsel's points and authorities are comprised in the opinion.

By Court, KENT, C. J. This cause was very ably argued by the counsel, and the several points submitted have received, as they merited, the attentive consideration of the court.

It was contended that a *bona fide* purchase by the defendants at St. Jago, for a valuable consideration, and without notice, was an equivalent to a purchase in market-overt under the English law, and bound the property against the party who had right. As no local law is alleged, or proved, this question must be governed by the general principles of the law of sales, which we are to presume until the contrary be shown, are received and adopted in all commercial countries, at St. Jago as well as New York. It was the maxim of the civil law that *nemo plus juris in alium transferre potest quam ipse habet*; and this plain dictate of common sense is considered by Pothier, *Traite du Contrat de Vente*, part 1, n. 7; and Erskine, *Inst. of the Law of Scotland*, vol. 2, 481, as a fundamental doctrine of the contract of sale in France and Scotland; and there is good reason to conclude that it prevails in most of the countries in Europe which have felt the influence or obeyed the precepts of the civil law. Lord Kames, in his *Historical Law Tracts*, tit. History of Property, vindicates this principle in the transfer of chattels, and observes that when notions of property were slight, a *bona fide* purchase of stolen goods gave a good title against the original owner; but that in the progress of society, property acquired such stability and energy, as to affect the subject wherever found, and to exclude even an honest purchaser, when the title of his vendor was discovered to be defective. It was also a principle in the English common law, that a sale out of market-overt did not change the property against the rightful owner; and the custom of the city of London, which forms an exception to the general rule, has always been regarded and restricted by the courts with unusual jealousy and vigilance: Comyn's Dig., tit. Market, E. The effect of such a purchase made here is not strictly before us, but I have no difficulty in saying that I know of no usage or regulation within this state, no Saxon institution of markets-overt,

which controls or interferes with the application of the common law. The purchase by the defendants did not, therefore, of itself, and without reference to the title of the vendor, give them an indefeasible right to the goods in question.

The original title of the plaintiffs to the coffee being made out upon the trial, and not contested here, we are next to inquire, whether the power and proceedings of the agent of the French government, established at St. Jago, were competent to authorize a sale of the coffee. This agency would appear to have been a prize tribunal with limited and provisional powers. There was a *procès verbal* received, and examinations taken by its authority, and a survey, sale and deposit of the proceeds ordered, and the agency is stated to have been established for such purposes. It also appears that at the time of the bringing of the vessel into St. Jago as a prize, and at the time of the sale, Spain was a neutral power, and that there had not been any judicial condemnation of the cargo; but only an order of this agency for a provisional sale. I need not question a provisional sale in cases of necessity, under the orders of a competent court; but I deny the legality of the power exercised at St. Jago. The object of such tribunals in neutral ports, is probably to facilitate the sale and increase the profits of prizes; but the object is not to be attained by such means. *Ausis talibus istis non jura subserviunt*. Neutral ports are not intended to be auxiliary to the operations of the parties at war, and the law of nations has very wisely ordained that a prize court of a belligerent captor cannot exercise jurisdiction in a neutral country. All such assumed authorities are unlawful, and their acts void. This was so considered by the English court of admiralty, in the case of *The Flad Oyen*, 1 Rob. Adm. 114, and by the court of K. B., in the case of *Havelock v. Rockwood*, 8 T. R. 268. Lampredi, *De Commercio Neutrali*, etc., sec. 14, lays down the same rule, by saying that the judgment of condemnation ought to be rendered out of the territory of the neutral power. The proper and regular court to condemn, says the highly respected and authoritative Answer to the Prussian Memorial, is the court of that state to which the captor belongs; and that questions of prize are, and can be cognizable only in such court, and consequently, that the erecting foreign courts, or jurisdictions elsewhere, to take cognizance thereof, is contrary to the known practice of all nations. The Austrian ordinance of neutrality of the seventh of August, 1803, art. 17, refers to, and admits as valid, condemnations only by the judi-

cial authorities of the countries of the captors; and the supreme court of the United States in the case of *Glass v. The Sloop Betsey*, 3 Dallas, 6, declared that no foreign power could, of right, institute any prize court, or judicature of any kind, within the United States, unless warranted by treaty. From these cases, from the reason and fitness of the thing, and from the manifest inconvenience and abuse which would result to neutral rights, as well as to those of the powers at war, from the toleration of a contrary practice, I am satisfied that the rule which I have stated is correct and just, and supported by the soundest authority. The proceedings of the French agency at St. Jago are, then, to be put out of view as being *coram non judice*, and we are to consider the sale as made without any judicial sanction.

Such a naked sale by a captor, even of property professedly belonging to an enemy, is void in law, and incapable of divesting the title of the original proprietor. It is requisite that a sentence of condemnation be given by a court of the sovereign of the captor before a title to the prize can be transferred: 1 Peter's Adm. Decis. 27; 2 Id. 345, 346; 3 Rob. Adm. R. 29. This excellent rule has been long known and established in the English admiralty, as appears by the case of *Terremolin v. Sandys*, Carth. 423; 12 Mod. 143; and it seems now to be equally recognized on the continent as part of the law and practice of nations. The case of the *Flad Oyen*, 1 Rob. Adm. R. 114, and of the *Henrick and Maria*, 4 Id. 43; Heinec. de nav. ob. vet. mer. veh. comm., sec. 16; Azuni's Maritime Law, vol. 2, p. 242. Our own government, also, adopted the rule, during the revolutionary war, and bound itself to observe it. With respect to the capture of neutral vessels, under the pretense of a violation of neutral duty, or contravening the decrees of a foreign government, as was the instance in the case before us, the necessity of a previous trial and judgment is still more urgent and palpable; and that necessity is universally admitted.

We are next led to examine the effect of the sentence of condemnation at St. Domingo, subsequent to the sale at St. Jago. This sentence was intended to act retrospectively, and to cure all defects in the proceedings before the French agency; but it does not appear, and from the case we cannot intend, that the proceeds of the sale under the order of St. Jago, were deposited in any other place than St. Jago, and the admiralty at St. Domingo proceeded to exercise jurisdiction over the cargo, and to adjudge it lawful prize, when the subject-matter of their

sentence was within the territory of a neutral power. An important and delicate question then arises, whether we are bound in such cases by the decision of a prize court. Such a court acts *in rem* only, and it cannot exercise a competent or efficient authority unless it have possession of the subject. Possession must be essential to its jurisdiction. It is the duty of a prize court to give a prompt and fair hearing to all parties, and to restore instantly, if upon a summary examination there does not appear sufficient ground to proceed. But how can this hearing be had and this restoration made and enforced, when the subject-matter in controversy, and, perhaps, the captors and captured, are in a foreign country? The admission of a practice so incompatible with the very constitution of a prize court, would lead to the greatest confusion. Suppose a foreign prize court should sustain a libel against a vessel lying within one of our own harbors, and should proceed to try, condemn and sell the same, would any person hesitate to say that such a jurisdiction was inadmissible? That such a proceeding was *coram non judice*? To sustain jurisdiction in such a case would be the height of injustice and absurdity. The old rule, mentioned by Bynkershoek, of allowing belligerents to carry their prizes into neutral ports, and to sell them there, was founded on the doctrine that bringing the prize *infra præsidia*, did of itself work a transfer of title. But the alteration in the sense and practice of nations, by requiring a judicial condemnation before a change of title can take place, has done away the former indulgence as incompatible with the new improvement; an improvement which has become an essential and most salutary control over the exercise of the right of maritime capture. Valin, who published his Commentaries in 1760, considered it then as having become the law of nations that prizes could not be carried into a neutral port, unless in cases of necessity, without a violation of neutrality, and this prohibition was in one of the established ordinances of the marine: *Ord. de la Marine des Prises*, art. 14, and Valin, *ibid.* Among the regulations of congress upon this subject, in the year 1781, they acknowledged their obedience to the law of nations, according to the general usages of Europe; and they undoubtedly declared their understanding of those usages when, in the same year, they ordered all prizes to be kept safe without sale, until they had been passed upon by a competent court, and that all prizes were to be brought for a judicial determination before a prize court within the United States, or within the dominion of an ally of

America: Journals of Congress, vol. 7, 68, 189. The case cited from March, *Shermoulin v. Sands*, p. 110, is interesting, inasmuch as it contains so early a recognition in England of the modern rule, that a prize must be brought *infra præsidia* of the power by whose subject it was taken, or the property would not be altered, and the sale would be void.

Sir William Scott, in the case of the *Henrick and Maria*, 4 Rob. Adm. R. 43, admitted that upon principle, and according to the better opinion and practice, the prize ought to be brought within the ports of the sovereign of the captor, or within those of an ally of such sovereign, and that possession founded the jurisdiction; but he observed that the English admiralty had gone too far in sanctioning condemnations in England, of prizes abroad in a neutral port, to permit him to recall the vicious practice of the court to the acknowledged principle. We are fortunately under no such embarrassment in the present case; and though precedents have controlled Sir William Scott, *ego tamen Scevolæ assentiôr*; and we are at liberty to consider the condemnation at St. Domingo as void, for want of jurisdiction in the court over the subject.

It has been strongly urged that this court is concluded by the sentence, and has no authority to inquire into its extent and force, because the question of prize and all questions incident thereto belong to the exclusive cognizance of the admiralty courts. It is a sufficient answer to all this to observe, that we are not inquiring into the question of prize. The plaintiffs prove a property in the coffee, and the defendants justify under a capture, condemnation and sale abroad; but before the defense can be received, it must appear that the condemnation was by a court having competent jurisdiction in the case, and so far, we have of necessity an incidental jurisdiction. It would be a monstrous doctrine, to hold that we are concluded by every assumed authority. We are not to examine into the validity of the capture, but we must look so far as to see whether the condemnation was by a tribunal competent to pronounce it in the given case; and if that is once ascertained, I agree that we must admit the defense to be conclusive. In the case of *Oddy v. Bovill*, 2 East, 473, a similar question arose as to the legality of a French prize court sitting in Spain, and no objection was raised as to the competency of the king's bench to sustain the inquiry; and in the case of *Havelock v. Rockwood*, the same court did not hesitate to declare that the French court of admiralty at Bergen was illegal. It is the practice of the

courts of law, in cases of insurance, to reject the decisions of foreign prize courts, if it appear that they proceeded upon local ordinances, or on grounds contrary to the law of nations: *Mayne v. Walter*, and *Saloucci v. Johnson*, cited in *Park*, and admitted as valid in *Geyer v. Aquilar*, 7 T. R. 696. I cannot entertain a doubt but that we have authority to inquire and are bound to say, whether the foreign court was, by the law of nations, competent to pass the sentence in question, and, having determined that it was not, that such sentence cannot prevail in the present case.

The only remaining point in the case is, whether damages ought to have been assessed for the moiety of the coffee which belonged to the plaintiffs conjointly with the master. This question admits of no difficulty. It appears to be settled in the books, that in actions of trover and trespass, the plaintiff may sue separately for his aliquot share or proportion of interest in a chattel, and that the defendant may give the joint interest of others in evidence, in mitigation of damages, but that he cannot avail himself of the omission of the plaintiff, to unite the other tenants in common with him in the suit, otherwise than by pleading it in abatement. He cannot take advantage of it at the trial: *Skinner*, 640; 6 T. R. 766; 7 Id. 280; 5 East, 420; 1 B. & P. 70-75.

The hardship of this case upon a *bona fide* purchaser is calculated, upon the first impression, to strike the imagination. It was contended by the counsel, that such purchasers ought to have been favored; but, as an English judge has somewhere observed, arguments upon the hardship of a case are only quicksands in the law, which, if admitted, would soon choke and destroy all established principles. A steady adherence to rule in these cases, by requiring the purchaser of captured property to look at his peril to the title, and to derive it under a competent sentence, will tend to check the intemperate avidity and irregular proceedings of belligerent captors.

The opinion of the court, therefore, is, that the defendants take nothing by their motion.

Judgment for the plaintiffs.

BEBEE v. THE BANK OF NEW YORK.

[1 JOHNSON, 529.]

RIGHTS OF ASSIGNEE OF CHOSE IN ACTION.—A purchaser of a chose in action can have no higher or better title than the person from whom he buys, and he takes it subject to all the equities existing against it in the hands of his assignor.

SATISFACTION OF JUDGMENT BY ASSIGNOR.—Where the assignor of a judgment had given satisfaction thereof, and it had been entered on record, it was held that third persons, who on the faith of such satisfaction lent money to the debtor, taking confession of judgment as security, acting in good faith, and in reliance on the record, and without notice of the assignment, were entitled to have the assignee enjoined from proceeding on the judgment, and have him account as trustee for what he had collected.

EQUITABLE RELIEF UNDER GENERAL PRAYER.—A party will not be denied relief by a court of equity merely because he is mistaken in the specific relief prayed for, but if his bill contains a prayer for general relief, the court will give the relief required by the facts of the case.

GROUND FOR NEW TRIAL.—The rule, both at law and equity, is to refuse a second trial where the propriety of a verdict is not impeached as against law or evidence, though there be material evidence for the party against whom the verdict had passed which was not adduced; unless it be shown to have been discovered after the trial, or unless the verdict has been obtained by fraud or surprise.

APPEAL from an interlocutory order of the court of chancery. The facts are as follows: By virtue of a warrant of attorney, John Wardell, on July 8, 1800, entered up judgment in his favor against Joseph Eden upon a penal bond in the sum of one hundred thousand dollars, conditioned for the payment of fifty thousand dollars. To secure a debt due from Wardell to Nathaniel Olcott, the former assigned to him this judgment against Eden, which judgment Olcott, on August 1, 1800, assigned absolutely to Roe, who in turn assigned it to the respondents, on October 7, 1800, by whom notice in writing of the assignment was given to Eden on October 9, 1800.

In July and August, 1800, Eden paid to Wardell all the money due on the judgment, save four hundred and sixty-seven dollars, which was paid on October 6, 1800; and on the tenth of October, Wardell acknowledged satisfaction of the judgment.

In the same October, the respondents, the Bank of New York, applied to the supreme court to have the satisfaction acknowledged by Wardell vacated, on the ground of fraud; in April following the application was granted, and the respondents sued out a *fieri facias* upon the estate of Eden, which was satisfied to the amount of fourteen thousand and seventy-six

dollars and fifty-four cents, and as to the residue returned *nulla bona*.

In June following the issuance of the writ of *fieri facias*, Bebee and Barlow filed their bill, from which it appeared that on October 11, 1800, Eden and his brother had executed a penal bond in the sum of forty thousand dollars, conditioned for the payment of twenty thousand dollars to Barlow, together with a warrant of attorney to confess judgment, which was accordingly entered up; that Bebee was jointly interested with Barlow; that the money on which the judgment had been obtained had been loaned to Eden after the satisfaction of the judgment of Wardell against Eden had been regularly acknowledged; that they had received no satisfaction on their judgment; and claimed a restitution of the moneys in the hands of the Bank of New York, recovered by virtue of the *fieri facias*. Olcott, who had become bankrupt, and his assignees were made parties defendant, but, after filing their answers separately, joined no further in the proceedings with the respondents.

It appeared that prior to the assignment by Olcott to Roe, Wardell had settled his account with Olcott, giving him three promissory notes in payment for the balance, which were soon after transferred by Olcott, and had since been paid, except the sum of one thousand two hundred dollars due on one of them.

The chancellor before whom the cause was tried directed a trial of feigned issues to determine whether Eden had notice of the assignment of the judgment prior to October 7, 1800, and to ascertain what payment had been made by Eden on such judgment before receiving notice of the assignment. The jury found that Eden had no notice until October 9, 1800, and prior thereto had paid Wardell fifty thousand dollars on the judgment.

At the trial of these issues, Olcott was offered as a witness in behalf of the respondents, and rejected on objections: 1. That he was defendant in the suit in chancery, and no measures had been taken to have his name struck out of the bill; and, 2. That having assigned absolutely a judgment he had received merely as collateral security, he had been guilty of fraud, and would be liable for costs.

On motion of the respondents, the chancellor granted a new trial of the issue, to admit the testimony of Olcott, which, he ruled, had been improperly rejected, and from this order the complainants took their appeal to this court, where the case was argued on its merits.

Baldwin, Radcliff and Hoffman, for the appellants.

Benson and Harison, for the respondents.

TOMPKINS, J. The appeal in this cause is from an order of his honor, the chancellor, awarding a new trial of the feigned issue. The pleadings and proofs being now before us, the counsel, according to the course and practice of this court, have argued the cause at large upon the merits. Independently of the objections to the particular order appealed from, the appellants insist that a feigned issue was unnecessary; and that they are entitled to a decree in their favor, for the following reasons: 1. Because the judgment of Wardell was satisfied on record, when the appellants fairly, and for a valuable consideration, obtained theirs; and that they, therefore, have a prior and superior right to satisfaction; 2. Because the right of Olcott, and the assignees of the judgment in favor of Wardell, was extinguished by the payment of the consideration for which it was given; and, 3. Because the payment by Eden was before he had notice of the assignment of the judgment.

If either of these grounds be tenable, it will be unnecessary to decide upon the objections to the form of the order for a new trial. My observations will be confined to the first and second points, both of which I consider as conclusive in favor of the appellants.

The consideration of Barlow's judgment was not impeached by the answer of the respondents, and it was not incumbent, therefore, upon the appellants to go into evidence of it. But if such evidence were necessary, it may be collected from the pleadings and testimony. The bill avers a consideration; the answer does not deny it; and the testimony of Eden, uncontradicted upon that point, explicitly proves it.

It will not be denied that if any fraud were practiced by Eden and Wardell, against the bank, in the acknowledgment of satisfaction, and the appellants were apprised of it when their judgment was obtained, the first point relied upon by them cannot be maintained. It is, however, alleged in the bill, that Barlow's judgment was obtained when that in favor of Wardell was satisfied on record, and upon a supposition that nothing was due thereon. Should it be essential, therefore, to aver in the bill, want of notice, the above allegation substantially amounts to it. In my opinion, however, an averment of notice is necessary in those cases only where the party possessing an equitable right applies for relief against such persons as have obtained a legal right. In such cases, to obtain the relief sought, it is

essential to aver, that the legal estate was acquired with notice of the equitable right. There it is an affirmative allegation, and susceptible of proof; in this case, it would have been the averment of a negative, which could not have been proved, and, therefore, ought not to be required.

The fact of notice was indispensable to support the defense of the respondents, and it, therefore, became requisite for them to set up and prove that the appellants had notice of the equitable claim. Accordingly, in the answer, they insist that Wardell, Eden and the appellants, combined to deprive the respondents of their security under the judgment to Wardell. This charge necessarily implies that Bebee and Barlow had notice of the assignment to the bank. The replication put that fact in issue; and had it been established by proof, the appellants could not have maintained their first point. What evidence is afforded to establish the fraudulent combination imputed, by the answer, to the appellants? The answer itself is not evidence of notice, because it is not verified by oath, and because, if it had been, it could not be received as proof of matter in avoidance, which can only be established by testimony *aliunde*. Exclusive of the answer, there is nothing in the cause having the remotest tendency to prove the notice or combination charged in it; unless the particular relief, sought for by the bill; is construed into an admission of notice. The relief prayed for is, that an injunction issue, and that the judgment in favor of Wardell may stand as a security for such sum only as may appear to be really due thereon from Eden. The specific relief prayed is not set forth in the case presented to this court; nor have the counsel for the respondents argued the cause upon the ground that an admission of notice is thereby implied. Had the respondents entertained an opinion that notice was conceded by the bill, it is to be presumed that they would have relied and insisted upon it in their answer as a conclusive defense. But whatever might have been their impression on that point, it is sufficient to say, that admissions which will conclude a complaint, are only to be sought for in that part of the bill which contains a state of the case, or title upon which he relies for relief. Even a mistake in the special prayer of the bill, provided there be a general prayer for such other relief as the nature of the case may require, as there is in this bill, will not deprive the party of that relief to which the nature of his case entitles him: Mitford, 38; 2 Mod. 91, 92. If, therefore, in this case, the appellants, when they filed their bill, were advised that the

particular relief solicited by them was the utmost they could obtain in consequence of the order of the supreme court, in relation to Wardell's judgment, that misapprehension of their rights ought not to prejudice them. They are, therefore, in my opinion to be regarded as *bona fide* incumbrancers, without notice, for a valuable consideration, and their prior right to satisfaction is evident, unless the proceedings of the supreme court, in vacating the satisfaction of the judgment to Wardell, deprives them of that right. The effect of those proceedings will now be considered.

The respondents, being assignees of a chose in action only, never possessed a legal lien upon the property of Eden. Subsequent to the entry of satisfaction, they surely had no such lien; and it is equally indisputable that Barlow's judgment, obtained prior to the order to vacate the satisfaction, did give him a legal lien. When the supreme court interposed its authority, it assumed equity powers; and the proceedings there cannot be deemed to have any greater operation than a similar interference of the court of chancery would have had. It is an invariable rule in equity, that where one party has obtained a legal advantage, and in equity is equal, not to disturb the legal right. In this case the appellants had not only fairly obtained a legal superiority, but appear to me to have had the equity on their side, inasmuch as they loaned their money expressly upon the security of their judgment; whereas the bank obtained their assignment to avert, if possible, the loss of a previously existing debt, created by the imprudence of their agent. Under such circumstances, it is not to be presumed that the court of chancery would have postponed the legal lien of a party not before the court, having no notice of its proceedings, and not heard. Both the counsel and the supreme court seem to have viewed the effect of the order to vacate the satisfaction of Wardell's judgment in the same light in which I have considered it; because a leading reason assigned to induce that court summarily to interfere, was to prevent the intervention of new liens. But it would not have been material to press an immediate *vacatur* of the satisfaction, if such new liens would not have been entitled to prior satisfaction. The court intended to place Eden, Wardell, and the assignees of Wardell's judgment, who were the only parties before them, *in statu quo*; and to give their order a greater operation, or to conclude third parties by it, would produce manifest injustice. They surely never intended to decide upon the rights of persons who were without notice of the application, and unheard.

With respect to the second point, it is observable that Olcott's answer admits the truth of Wardell's testimony as to the object of the assignment to Olcott. The judgment was to be held by him as collateral security only. Neither this fact, nor the fact of payment by Wardell to Olcott, of the debt intended to be secured, will be affected by the determination of the feigned issue. We must, therefore, decide them upon the proofs as they now stand. I have before observed that Wardell and Olcott unite in saying that the assignment was made for a specific purpose only. But they are at variance in regard to the sum intended to be secured, and with respect to the payment of that amount. Upon this point, however, Wardell is clearly entitled to credit. He not only specifies the particular notes which the assignment was intended to secure, but, in his account with Olcott, states to whom they were transferred and paid. This enabled the opposite party to detect the falsehood, if any, in the relation of Wardell. On the other hand, Olcott's answer contains a mere averment of a conjectural balance, at the time of the assignment to Roe, without referring to any accounts, admissions of Wardell, notes, or other documents, to support the truth of his statement. Besides, to gloss over his conduct in regard to Roe, must have been a powerful motive operating on his mind. If he had admitted that nothing was due from Wardell to him, when he assigned the judgment, he would thereby have charged himself with a gross imposition upon Roe. To avoid this imputation, he introduces his belief, at that time, which belief is not afterwards fortified by any documents or proof. The purpose of the assignment, and the payment of the consideration of it by Wardell are, to my mind, satisfactorily established. In *Davies v. Austen*, 1 Ves. Jr. 249, it is laid down by the lord chancellor, as a universal rule, that a purchaser of a chose in action must always abide the case of the person from whom he buys. If, then, the consideration, for which the judgment was assigned to Olcott, were satisfied, all his right was extinguished; and, therefore, Roe and the respondents, according to the rule laid down in the above case, acquired no right by the assignments, if they were made after payment by Wardell; and if the notes were paid subsequent to those assignments, that payment extinguishes their right.

I am, therefore, of opinion that a feigned issue was unnecessary; and that, as the respondents have by their answer admitted the receipt of the proceeds of Eden's real estate, they are to be regarded as trustees for the appellants for the amount

due upon the judgment in favor of Barlow, and ought to account for the same accordingly; and that the order of his honor, the chancellor, awarding a feigned issue must be reversed.

SPENCER, J. I forbear to repeat the facts and circumstances of this case; they have been so often mentioned that no member of the court can be unacquainted with them.

The supreme court, in vacating the satisfaction of the judgment of Wardell against Eden, exercised a jurisdiction until very recently within the acknowledged province of a court of equity alone. The protection of the rights of an assignee of a chose in action by courts of law is, perhaps, essential to the administration of justice; it certainly avoids great expense and delay to suitors, and it therefore, as far as this case goes, meets my decided approbation. But when a court of common law does interpose to protect a party vested only with an equitable right, and such interposition affects the rights of third persons, some known standard must be resorted to to test the effect of their proceedings. There is none so appropriate as that furnished by considering the proceeding as having taken place in a court of equity. It is a universal and established principle, as well in that court as, indeed, in all others, that no man is to be condemned unheard; the rights of none can be immediately affected by a judicial proceeding to which he is not a party. This proposition is so just an essential, that I should think it weakened by citing authorities in its support. It comes home to the common sense of every man; it is, and must be, a first principle. The appellants, or those they represented, were never called on, by any citation or process, to defend their rights before the supreme court, when the satisfaction was vacated. The respondents' counsel, unable, and I trust, unwilling, to assert that the order of that court affected a party not before it, resorted to reasoning to induce this court to believe the appellants guilty of laches in not appearing, and as thereby forfeiting their rights, because they might have heard of the pendency of the motion to vacate the satisfaction. It would, I think, be extravagant in this court to suppose a fact, which, if it were material, and could be proved, has not been made out. It would be introducing a new principle in judicial proceedings to require of a party to volunteer his appearance. This objection is so obviously untenable as to require no further notice.

As it regards the appellants, then, I consider the satisfaction of the judgment as unaffected by the proceedings between the bank and Eden. It follows that the appellants have the legal

lien on the real estate of Eden. It then remains to be examined whether the appellants have equal or superior equity to the respondents. If it should appear that they have either, their right to the proceeds of the real estate of Eden, to the extent of their judgment, necessarily results. It has been urged that the circumstance of Barlow's lending money to Eden on the very day the satisfaction was entered, affords suspicion. I agree that it is a circumstance somewhat extraordinary; but I do not think it warrants me in imputing to them an act of fraud on the party; fraud is odious and not to be presumed. Had there been no proof of the money advanced by Barlow, I should consider the giving the bond and confessing judgment as *prima facie* evidence of the fairness of the debt; but when we recur to the evidence, we find Joseph Eden testifying expressly that Barlow lent him eight thousand dollars in cash, and his notes and checks to the amount of twelve thousand dollars more. This testimony is uncontradicted, and it being an important fact in the cause, the respondents, if they would have controverted it, should have gone into adequate proof. In vain are we told that Barlow and Bebee were men of bad character, and incompetent to advance to Eden to that amount. These are facts which must be proved before they can produce any effect; whilst they rest on suggestion they have no influence.

It is to be observed that the bank got hold of the assignment of Wardell's judgment against Eden as a plank by which to save themselves from the losses sustained from Roe, who obtained it to mitigate the loss occasioned by Olcott. Neither the bank nor Roe made any advances on the faith of that assignment. As it regards the appellants, it was not until after search at the proper office, that they advanced their money on the faith of the security afforded by the real estate of Eden. When the appellants gave credit to Eden, they had a lien on his real estate. This lien has been taken away, but in such a manner only as to change the remedy; it still exists in the view of a court of equity. The appellants having equal, and, I think, superior equity to the respondents, and having the legal preference, I consider them entitled to the proceeds of the real estate of Eden, on every principle of justice and equity. And here I might terminate my inquiries; but the importance of the cause, both as to principle and value, demands of me the examination of some other points.

It is material, in ascertaining the rights claimed by the bank, to consider the nature and effect of the assignment by Wardell to Olcott, that by him to Roe, and by Roe to the bank.

It is an incontrovertible proposition, that the assignee of a chose in action takes it subject to all the equities it was liable to in the hands of the assignor; or in plainer language, the "purchaser must abide by the case of the seller:" 2 Vern. 192; 1 Eq. Abr. 45; 1 Ves. Jr. 249. The reason and justice of this rule is obvious; the holder of a chose in action, excepting such as are made negotiable for the advancement of commerce, cannot alienate anything but the beneficial interest he possesses; he cannot vest the legal right to sue for and enforce, in the name of the assignee, the payment of a debt, secured by a bond or judgment. When, therefore, Wardell made the assignment to Olcott, he took the judgment subject to all equities existing between Eden and Wardell; and when the subsequent assignments were made, Roe and the bank respectively assumed the situation and stood in the place of Olcott, as related both to Wardell and Eden. It would be absurd to pretend, that because the assignment to Olcott was general in its terms, he could, therefore, transfer a greater interest than he held in the judgment. Had Roe and the bank, instead of taking the assignment for better or worse, and with the hope of realizing something, which they clearly did, made advances to the whole amount, the legal consequence would be the same. In the present case, they have not the pretext for saying they were imposed on by the generality of the assignment to Olcott, because they gave no new credit. A bond on which there are no indorsements, carries on its face strong presumption, if it be a recent one, that it is unpaid; still, an assignee must abide by the case of his assignor, if it has been paid. If it be illegally obtained, the obligor will avoid it. It becomes necessary, then, to inquire for what purpose the assignment was made to Olcott, and whether that purpose had been satisfied.

Wardell is the only witness who speaks directly to these facts. He says, that the judgment was assigned to secure to Olcott the payment of twenty-five thousand five hundred dollars he then owed him, and for which he also gave three promissory notes; that these notes Olcott negotiated, and that they have been paid, or, at all events, Olcott is not responsible on them as indorser. In support of the fact that the judgment was assigned only as a security for the notes, he presents an account current with Olcott, by which there appears a balance due to Wardell. To oppose these facts, Olcott's answer is resorted to. It admits the fact that the assignment was made to secure the notes, and that they had been negotiated; but it

asserts that it was also to secure to him future advantages and responsibilities; and he adds, that Wardell being indebted to him as he believed, at least in twenty thousand dollars, and he being indebted to Roe, he made the assignment as security to him. If Olcott's answer receive all the credit due to the deposition of a witness, and his character and conduct had been fair, still I think Wardell's testimony entitled to superior credit. He furnishes his data for saying that he owed Olcott nothing beyond the three notes. On the other hand, whether Olcott, in stating the debt from Wardell, includes in his estimate the notes, or on what grounds he made the assertion, we know not. He has produced no books, no documents, to support him, but is vague and indefinite. Wardell's competency as a witness has been questioned; I perceive no reason to doubt either his competency, or his disinterestedness; his interest, if any, is to uphold the judgment, and his testimony goes to destroy it. He then swears against his interest, and this, instead of invalidating, strengthens his credit. It is alleged that he fraudulently entered satisfaction of the judgment. This depends on the verity of his evidence as to the nature of the assignment to Olcott; if it was as he states it, then, on the payment of the notes, he alone was entitled to acknowledge satisfaction.

Feeling myself constrained to yield the greater credit to Wardell, it follows that the object of his assignment to Olcott was fulfilled by the payment of the notes; and from the principles I have before laid down, Olcott's interest in the judgment ceased, and those deriving title under him, being invested with no other or greater right than he had, can, neither on legal or equitable principles, pretend to a right emanating from one who ceased to have any. I will only observe, that by the assignment to Olcott, he acquired an equitable interest commensurate with the object for which it was made. His transfer of the assignment vested his assignee with his equitable interest, and no more. The assignment of an assignment acquires no negotiable quality, and the last assignee cannot, it appears to me, be clothed with a greater title than the first assignor. On either and both of these grounds, I am fully of opinion, the appellants are entitled to the decree of this court, for the money produced by the sale of Eden's real estate. It necessarily follows, that the issue to try whether Eden had notice of the assignment to Olcott, and what sums were paid by him to Wardell and the periods of those payments, was irrelevant and immaterial.

I am nevertheless disposed to bestow some consideration on the order appealed from. After the first order for the trial of the feigned issue, and a verdict for the appellants, which affirmed the payments by Eden, and negatived the notice to him of the assignment by Olcott, a second trial was ordered, on the ground that Olcott was a material witness, and through the mistake or inattention of the respondents' counsel, had not been struck out of the bill. If his name being in the bill did really incapacitate him as a witness, I think the respondents concluded by their mistake or inattention. The rule both at law and in equity, is to refuse a second trial where the propriety of the verdict is not impeached as against law or evidence, though there be material evidence for the party against whom the verdict has passed, which was not adduced, unless it be shown to have been discovered after the trial, or unless the verdict has been obtained by fraud or surprise: 1 Ves. Jr. 134. If mistake in practice, or inadvertence in attention furnished reasons for a new trial, it would encourage litigation, and reward ignorance and carelessness at the expense of the other party. The materiality of Olcott's testimony was well known before the trial, because in his answer he alleges that soon after the assignment he gave notice to Eden. The respondents cannot pretend that by fraud or surprise they were prevented from having his name struck out of the bill. I am inclined, however, to think that notwithstanding his name was in the bill, he was a competent witness. Most clearly Olcott had no interest in the cause; his contingent right in the surplus of his estate he released to his assignees, no decree could possibly pass against him; but he might, it has been said, have possibly been punished in costs. From the time of Lord Hardwicke, courts of law have been liberal in the admission of witnesses; and where the interest is not immediate or certain, they admit the witness as competent, and suffer the objection of a remote, contingent, or possible interest to go to his credit. On the score of authority, I think Olcott a good witness. The cases of *Cotton v. Lutterell*, of *Piddock v. Brown*, and *Man v. Ward*, 1 Atk. 451; 3 P. Wms. 289; 2 Atk. 228, are strongly in favor of his admission. Did the cause rest, therefore, on the propriety of a new trial, I should be for affirming the decree. The other points on which I have observed, render any investigation of the facts forming the feigned issue unnecessary and superfluous.

From a suggestion made by an honorable member of the court, I have taken the trouble to examine the bill and answer,

having, in forming my opinion, presumed that the parties would present every fact in their respective cases most favorable for themselves. The bill, it is true, states all the circumstances attending the transaction, and particularly the various assignments of the judgment in Wardell's favor against Eden, and it concludes with a special prayer, that that judgment may not be deemed a lien beyond the balance due on it from Eden to Wardell. It also contains a general prayer for such relief as in equity and good conscience the party is entitled to. In the whole course of the very elaborate and ingenious arguments submitted by the respondents' counsel, no stress was placed on either of these points. It was not pretended that the appellants had notice of the situation of Wardell's assignee, or that they knew, when they lent their money, that the bank was interested in the judgment. Most clearly, there is no evidence to warrant such arguments. I do not think that we are called upon to be astute in finding out formal objections which never occurred to the counsel, to deprive the party of a just right, or to turn them round; but since they have been stated, I will briefly proceed to discuss them. It by no means follows, that because the appellants, when they filed their bill, knew the situation of the bank, that they had that knowledge when they lent their money and took their judgment. Neither does their omission to state their ignorance of those facts at the time of the loan, justify a presumption of such knowledge, especially after the bank had, in their answer, charged them with collusion with Wardell and Eden, to injure them, and to deprive them of their security under Wardell's assignment, and have wholly failed to substantiate the charge. This allegation of collusion made by the bank, was put in issue by the appellants' replication, and the *onus probandi* was thrown on the bank. If, therefore, it would have been more technical to have denied notice in the bill, substantially that point has been at issue, and is found for the appellants. It may be true, that if A. contract in writing with B. for the purchase of land, and C. takes a conveyance subsequently, and a bill be filed against him for a specific performance, charging collusion with B., C. must, in his answer, not only make out that he is a fair *bona fide* purchaser, for a valuable consideration, but without notice of A.'s interest. The distinction is manifest between a bill and an answer. Every complainant has a right to a full answer to the facts charged; and when charged and not denied, it may be deemed an admission of the facts. The complainant's bill is no evidence for

him, and his omission to state a fact, cannot furnish evidence of the fact, especially when insisted on as a defense, and not established.

With respect to the prayer for a specific relief, it is to be observed that probably the appellant's counsel in drawing the bill might have had full confidence in the fact of Eden's paying of the judgment, or nearly so, without notice, and he might, and probably did, suppose the *vacatur* entered by the supreme court conclusive on the appellants. It would be rigorous, when a party had proved himself entitled to the decree of a court, to say to him: "You ought to be relieved, but you put your right on a false basis." Fortunately, for the justice of the case, this is not law. "It is usual," says Mr. Mitford, in his excellent system of chancery proceedings, "to add to the prayer of the bill a general prayer for that relief which the circumstance of the case may require, that if the plaintiff mistakes the relief to which he is entitled, the court may yet afford him that relief to which he has a right." Mr. Hinde, Practice, 17, confirms this in nearly the same words. In the case of *Hollis v. Carr*, 2 Mod. 91, the court decreed a relief under the general prayer, distinct from the special relief prayed. I conclude, therefore, that there exist no objections in this cause which might entangle justice in the net of form. Various judgments of this court establish the precedent that on appeals from chancery, and where the merits are fairly before the court, they will pronounce a final decree. [See *Le Guen v. Gouverneur*, 1 Am. Dec. 121.] This case falls within those precedents. It is therefore my opinion that the appellants be decreed to receive the net proceeds of the sale of Joseph Eden's real estate, under the execution in favor of Wardell.

THOMPSON, J., delivered a concurring opinion, and *Woodworth*, attorney-general, concurred.

KENT, C. J. I shall be obliged to differ from my brethren who have preceded me. This I do with deference and reluctance, but under the pressure of superior duty to pursue and declare the conclusions of my own judgment.

The most important question which has been raised in this cause is, whether the appellants are to be considered as having a priority to the respondents in respect to the judgments against Eden. This pretension ought first to be examined and settled. If the appellants are entitled to a preference, all the other points in the cause become immaterial, for as between two con-

tending judgment creditors, he who has the prior judgment must be first paid. The manner in which this question is brought before the court is a little singular, and deserves attention. The appellants filed their bill in the court below, on no other ground of complaint than that the respondents were proceeding at law to collect the amount of Wardell's judgment, after it had been once paid. It was their only grievance that the judgment was likely to be twice collected, and that as Eden was insolvent, the judgment of the appellants must remain unsatisfied. The cause proceeded to a hearing, and an issue was awarded on the single question of payments by Eden before notice of the assignment. In the awarding of this issue, the appellants acquiesced, and the point raised in this court was undoubtedly an after thought, as it is not so much as once suggested in the bill, and as it formed no part of the litigation below. But after contending so long under the limited claim of subsequent judgment creditors, the appellants come with a suspicious countenance before us, at this late hour, and under the same bill, to claim the benefit of prior judgment creditors. In most cases such conduct would justly be deemed a waiver or abandonment of the latter claim; for, if the present pretensions of the appellants be well founded, then all the examinations and trial below, about notice to Eden and payments by him to Wardell, were idle and nugatory, and an abuse of the time of the court. If, however, the appellants be not absolutely concluded from setting up this new ground of title, yet their conduct forms a powerful reason why this court should listen to it with caution and distrust. So prominent a point in a cause could not have slumbered so long without a diffidence in the facts that were requisite to maintain it. The proofs of their pretensions to be *bona fide* judgment creditors without notice, ought at least to be of the most positive kind, without any shadow of doubt or ambiguity.

The acknowledgment of satisfaction by Wardell was vacated by the supreme court, on the ground that, as Wardell had previously assigned over his right and interest in the judgment, his interference in canceling that judgment, without the knowledge and consent of the assignee, was an act fraudulent and void. After he had parted with his interest in the judgment, he had no more power over it than if he had been a stranger to it; and his attempt to vacate it was a violation of right. The supreme court, however, never meant to decide on the claims of an intervening creditor, who had obtained a

regular judgment in the interval between the time of the entry of the satisfaction and the subsequent *vacatur* of it. Such a case was not then before the court; but such a case is now urged in the present cause, and, under the circumstances in which it is presented, it merits our most serious consideration, because it touches on some of the soundest and best settled principles in our equity system. If this intervening judgment creditor should come before us, without any knowledge at the time, that the satisfaction had been granted by a man unauthorized to make it, he would, undoubtedly, have a very good claim not to be disturbed by the court. For, if a creditor who takes a judgment or mortgage, should previously inspect the records, and find all antecedent judgments and mortgages canceled, and should have no knowledge how they came to be canceled, beyond what the record speaks, a court of equity would, in that case refuse any aid against him, notwithstanding it should afterwards appear that the prior judgment, or mortgage, had been fraudulently canceled. But I am warranted, by the uniform current of the chancery decisions, in saying that in such a case the court would refuse to interfere between the two creditors, and would leave him, who had any legal advantage, to retain it. The court would not act against either, because the equities of the parties would be equal. A creditor who comes in with his lien, after all antecedent incumbrances appear to be satisfied, has, no doubt, a strong claim to our protection. But the prior creditor, whose judgment or mortgage has been canceled fraudulently, and without his knowledge, has a claim equally strong and inviting. They are creditors equally innocent and equally to be favored; and I am satisfied that the court of chancery could not, consistently with its established principles, help the one to the prejudice of the other. Its answer would be, that where the parties stand equal before us, he who has the advantage at law shall be left to enjoy it; or, according to the lively allusion of Sir M. Hale, the party that has been fortunate enough to seize a plank in the shipwreck, shall not have it torn from him by the court. If, therefore, the appellants did really stand before us as judgment creditors, without notice of Wardell's assignment, we should be obliged to dismiss them, without affording them on that ground, any aid or assistance against the bank. Allow them all that they now pretend to be, we could do no more than this, without introducing principles and precedents unknown to our jurisprudence. I have supposed that in case of no notice, the equities of the

parties might stand equal. This ought not to be denied by the appellants. There is no doubt but that the bank took the assignment from Roe, for a full consideration, and to save themselves from a grievous loss, and without knowledge of any antecedent transaction calculated to defeat it. They cannot be deemed guilty of negligence in not recording the assignment, because it was not an act required by law to consummate their title. There was no office that was bound to record it. It is never done in practice, and there were, indeed, but four days between the assignment and the new judgment. It is idle, therefore, to impute any neglect to the respondents in diminution of their equal equity. On the other hand, I forbear to dwell on the fact that twelve thousand dollars of the appellants' demand arose from notes and checks, and that we are left wholly without explanation whether those notes and checks proceeded from the appellants themselves, or whether they were not notes and checks of Eden, which had been purchased up at a speculating discount in the market. If the latter was the case, then, indeed, I should agree that the equity of the parties was not equal, because the one side would be struggling to avoid a loss, whilst the other would be striving to gather in, and secure, the harvest of his speculations.

I have hitherto considered the appellants as if they had come here, in the character of *bona fide* purchasers without notice, and, even then, they could have no relief from us; all we could do would be to dismiss their bill, or to decide the cause on the grounds litigated in the court below. But the fact is, that the appellants do not come before us in that character. They are to be considered as acting with notice that Wardell had assigned over his interest in the judgment, at the time he acknowledged satisfaction. This inference appears to me to be the inevitable conclusion of law, from the silence of the appellants in their bill, as to the fact of their want of notice. If a party will claim a benefit, resulting from the want of notice, and the truth of the fact is within his own knowledge, he shall be presumed to have had notice unless he denies it. *Qui tacet consentire videtur*. The appellants, from their own showing, prove the acknowledgment of satisfaction by Wardell, to have been a nullity and a fraud; for they state his, and the subsequent assignments of the judgment, but they omit to state when they first came to the knowledge of these assignments, and for aught that this court can know to the contrary, it may as well have been before as after the date of their judgment. They content

themselves with saying that merely their own money was loaned after satisfaction had been entered, and upon a supposition that nothing was due. This supposition is perfectly consistent with a knowledge of the assignments, and may have proceeded from a credulous reliance on the assurances of Wardell and Eden. It is a rule in chancery not to aid a *cestui que trust* against a purchaser from a trustee, if he be a purchaser for a valuable consideration and without notice of the trust: *Williams v. Lambe*, 2 Fonb. 151, 152; 3 Bro. 264; *Jerrard v. Saunders*, 2 Ves. Jr. 454; *Strode v. Blackburne*, 3 Ves. Jr. 222. But no instance is to be found in which such purchaser is protected, unless he aver himself to be a purchaser, without notice of the trust. He is bound to state affirmatively in his plea that he had no notice, and whether he claims the benefit of the purchase in the character of complainant or defendant, it can make no difference in the case. The general rule of pleading in chancery is, that whatever is essential to the rights of the plaintiffs, and is necessarily within his knowledge, must be alleged positively and with precision: Mitford, 40. This rule is too reasonable and logical not to command the assent of every understanding. In the case of *Jerrard v. Saunders*, 2 Ves. Jr. 454, the defendant pleaded a purchase for a valuable consideration, without notice; but as the plea did not deny the facts charged, from which notice was to be inferred, the plea was overruled, and he was called upon to answer the facts, which might raise a constructive notice; and Lord Loughborough, in that case, required that the purchaser should fully, and in most precise terms, deny every description from whence notice could be inferred. If, then, the appellants, knew, at the time of taking their judgment, that Wardell had assigned his judgment, and that he was but a nominal party to the record, they acted at their peril; and they were bound to have inquired of the *cestui que trust* whether he was knowing and consenting to that satisfaction. If they did not choose to make that inquiry but were willing to rely upon the declarations of Wardell and Eden, they ought, justly, to bear the consequences of their supineness. We are not to help a party in setting out his title. It is incumbent on him to state a valid pretension. The appellants ask us to help a title which they challenge as superior by reason of Wardell's fraud; but, to raise any equity in their favor, they ought, at least, to purge themselves of any knowledge of that fraud. It would be a proceeding contrary to all rule and salutary precedent for us to presume that the appellants acted with-

out knowledge of Wardell's assignment, when they do not pretend to deny it in their bill, and when the truth of the allegation, that they had or had not notice, remained in their own breasts. This is, probably, the first instance ever heard of, that a person claiming to be a purchaser without notice, came into a court of equity in the character of plaintiff; and the reason that there has been no such case is the one already mentioned, that where the equity of the parties is equal, chancery will not interfere. I did not ask the appellants to do what they cannot do, prove a negative. They cannot prove no notice. But they can tell us, by their bill, in what character they claim relief. If they claim it as purchasers without notice, let them say so; then they raise some equity on the face of their bill, and it would lay with the respondents to rebut it, and to prove affirmatively that they had notice. My proposition has, at least, the merit of plainness and simplicity. It is, that the court will never presume that a party's case is better than he states it; and if he does not state that he is a purchaser without notice, we will not presume him to be one.

But the bill furnishes still more positive and conclusive proof on the subject. The appellants state, as their grievance, that the bank had levied an execution against Eden, when nothing was due from Eden thereon, and that thereby the appellants were deprived of their security. They then called upon the bank to discover whether Eden had not fully paid the judgment to Wardell, and they pray, "that the judgment of the bank may be decreed to stand as a security for such sum only as may appear to be really and truly due thereon by Eden." The bill, therefore, contains a very explicit acknowledgment that the judgment of the bank ought to have preference for the balance honestly and truly due thereon; and to give the appellants a priority in their judgment is to force upon them a right which they do not ask for, or pretend to. And although, under the general prayer in a bill for relief, you may give a party greater or different relief than that specifically prayed for, yet when such specific relief necessarily implies the non-existence or relinquishment of a claim, it would be altogether unprecedented to depart from the special relief, and under the general words of form in the bill, to enforce such claim.

I conclude, therefore: 1. That if the appellants were *bona fide* judgment-creditors, without notice of Wardell's assignment, they would have no more equity than the respondents, and this court would not interfere with their claim at law; 2. That the

appellants are not to be deemed such creditors, because they do not state themselves to be such in their bill, and because the whole complaint and prayer in the bill are founded on the non-existence or relinquishment of such claim. The parties stand exactly as they would have stood if Wardell had never made his fraudulent acknowledgment of satisfaction and the appellants, as subsequent judgment-creditors, have an undoubted right to establish, by proof, the payment of the first judgment. If Eden paid Wardell before notice of the assignment, the payment was valid, and his estate ought not to be charged with a second payment. The real merits of the cause will, therefore, turn upon this single point, what payments and to what extent, were made by Eden to Wardell, previous to notice. But before we come to consider this part of the cause, it will be requisite to take notice of another objection which has been raised by the appellants' counsel to any claim of the bank, as derived from the assignment.

It is urged that the assignment of the judgment to Olcott was not absolute, but was made and intended to be merely as a collateral security for a special purpose, which purpose was afterwards accomplished; that the consideration for that assignment was only twenty-five thousand five hundred dollars, and that shortly after, Olcott received of Wardell three promissory notes for that purpose, which he transferred to different persons, and that they have since been paid; that by the payment of the notes, the right of Olcott to hold the judgment became extinguished, and the interest in the judgment reverted back to Wardell; that Olcott could not transfer any greater interest in the judgment than what he himself held, and that every assignee of a chose in action takes it subject to all equity; and that, for these reasons, the bank has no interest in the judgment, all the interest which remained in it having reverted to Wardell. This is the substance of the argument on the part of the appellants, and, to my apprehension, it is easy to perceive and detect its fallacy.

In the first place it is to be observed that the assignment of the judgment is, upon the face of it, absolutely and not conditional. It is by a long and solemn instrument under seal, drawn with technical skill, declaring the consideration to be fifty thousand dollars, and fortified with every provision and covenant which are requisite to show that Wardell parted absolutely with all his interest in the judgment, and that he had received a full consideration. Proof that the assignment was

intended by the parties to be different from what is expressed, is altogether inadmissible. It is a sound rule of evidence, that you cannot alter or substantially vary the effect of a written contract by parol proof. This excellent rule is intended to guard against fraud and perjuries, and it cannot be too steadily supported by courts of justice. *Expressum facit cessare tacitum; vox emissa volat; litera scripta manet*, are law axioms in support of the rule; and law axioms are nothing more than the conclusions of common sense, which have been formed and approved by the wisdom of ages. This rule prevails equally in a court of equity and a court of law; for, generally speaking, the rules of evidence are the same in both courts. If the words of a contract be intelligible, says Lord Chancellor Thurlow, *Shelburne v. Inchiquin*, 1 Bro. 341, there is no instance where parol proof has been admitted to give them a different sense. Where a deed is in writing, he observes, in another place, *Jonham v. Child*, 1 Bro. 93, it will admit of no contract which is not part of the deed. You can introduce nothing on parol proof that adds to or deducts from the writing. If, however, an agreement is, by fraud or mistake, made to speak a different language from what was intended, then, in those cases, parol proof is admissible to show the fraud or mistake. These are cases excepted from the general rule. But the allegation of fraud or mistake must be made in the bill, before evidence to those points can be received: *Cripps v. Jee*, 4 Bro. 472. In the present case, there is no allegation or pretense that the assignment was made absolute by means of fraud or mistake; and on no other ground was parol proof admissible to alter it. If it were to be admitted that the assignment might be varied by parol proof, yet the proof offered in the present case was not of a competent nature. The witnesses on this point are Olcott and Wardell. Olcott, the original assignee, admits in his answer that the assignment was given for collateral security. That confession, however, is no evidence against the respondents, who are co-defendants, because they had no opportunity to cross-examine him. This court so decided two years ago, in the case of *Grant v. The Bank of the United States*. The testimony of Wardell to this point was wholly improper; for he ought not to be heard in opposition to his own solemn act and deed. The supreme court, in July term, 1803, in the case of *Winton v. Saidler*, did recognize and adopt the English decision in *Walton v. Shelly*, 1 T. R. 296, that no man should be permitted, even as a witness, to invalidate a negotiable paper which

he had signed. The case there arose on a promissory note; but from the reasoning of some of the judges, I understand them as adopting the general principle of the English case, that no person was a competent witness to impeach a deed or security which he had given, and that he was estopped, as well in the character of witness as that of party, by his own act and deed. This rule, that a written contract shall not be contradicted by parol proof, without showing an original fraud or mistake, at the time, applies as well where the contract is introduced in a controversy between third persons, as where the litigation is between the original parties to the contract. It was so understood by the court of king's bench, in the case of *The King v. The Inhabitants of Landon*, 8 T. R. 379. It is reasonable that this should be the case, in order to protect the rights of strangers who may have become interested in the contract, and to prevent fraudulent collusions between the original contracting parties, in setting up secret meetings to impair or destroy their own solemn engagements. It appears to me, therefore, that we must consider the assignment from Wardell to Olcott as an absolute, unconditional assignment, and that we are bound to judge of the nature of the assignment from the instrument itself, and not from the suggestions of Olcott, in his answer, or of Wardell, in his deposition.

But even admitting that the operation of the assignment was impeachable, and that the witnesses offered for that purpose were competent, and made out the fact that Olcott took the assignment as a collateral security merely, and for a much less consideration than it states, still there remains another objection to surmount, and that is, that in the hands of a subsequent assignee, without notice of any private agreement *de hors* the instrument, the assignment must be regarded what it purports to be, absolute and unconditional. This is a rule of a court of equity, perfectly well settled. When it is said that an assignee of a chose in action takes it subject to all equity, it is meant only that the original debtor can make the same defense against the assignee that he could against the assignor; the rule has never received any other application. A purchaser without notice from a purchaser with notice of a trust, is not considered in equity as bound by that trust: 2 Vern. 384; 2 Fonb. 153. If one affected with notice, says Lord Chancellor Hardwicke, in the case of *Mertins v. Jolliffe*, Amb. 313, conveys to one without notice, the assignee, in case he has the legal estate, shall protect himself against prior incumbrances. In the present case,

the bill does not charge the bank with any notice of a conditional assignment, and if it did, the answer of the bank denies any; for they declare that the original assignment to Olcott was for the full consideration of fifty thousand dollars, expressed in the deed, and that they were wholly ignorant that it was made for any other consideration, or for any other particular purpose. They further state that the assignment from Roe to them was for the like consideration. Indeed, it is not suggested in any pleading, proof or argument in the cause that the bank took the assignment from Roe with any knowledge of the parol agreement between Wardell and Olcott, and the chief objection to Olcott's testimony is on the ground that he did not disclose to Roe the private understanding between him and Wardell. In every view, therefore, in which the subject presents itself, the state of the accounts between Wardell and Olcott, and the secret conditions which they attached to the assignment, are perfectly irrelevant to the present controversy. Those accounts and agreements must be left to be settled between Wardell and Olcott. They ought not to obtrude themselves upon our present attention. I have thus faithfully endeavored to clear this cause of all the preliminary difficulties which have been thrown in its way by the ingenuity of counsel; and though I always feel a well-grounded diffidence in my own judgment when I am not supported by my brethren, yet the positions I have taken appear to my mind to be so hemmed in by authority that, step which way we will, we cannot escape from their conclusions without trampling upon precedents which we ought, perhaps, to revere.

I shall very briefly examine the remaining questions in the cause. The real question is that which I have already stated, viz.: To what extent has the judgment which the bank possess, been legally paid? Upon this question there is contradictory proof in the case, and it was for the information of the court below upon this matter of fact, that the issue was awarded. The chancellor had an undoubted right to have decided this question upon the proofs before him, without calling in the aid of a jury. But, where the question is doubtful, and especially where it turns upon the credit of opposite witnesses, it is the usual and prudent course of the court to refer it to a jury, which is the common law tribunal for the trial of facts. The payment of this judgment, if paid at all, was made to Wardell; for it is agreed that no payments were made to any of the assignees of the judgment; and it is a principle equally agreed

to, that all payments made by Eden to Wardell, before Eden had notice of the assignment, were valid, and that all payments by Eden after notice, were made by him in his own wrong, and were not available against the assignees. The question then is, when was notice of the assignment given to Eden? On the one hand, Eden testifies that he had no notice till the ninth of October; and, on the other hand, Olcott says he gave notice to Eden shortly after the assignment, which was made on the seventeenth of July. This testimony of Olcott's is objected to; but, as against the appellants, who called for that answer, it may be read in chancery; it is certainly not more objectionable than the testimony of Eden, who had never duly released his interest in the surplus of his estate. But, putting Olcott's answer entirely out of view, there was the testimony of Wilkins, who seems to be admitted as a disinterested and very credible witness, and he swears that Eden confessed to him that he knew of the assignment at the time it was made. Thus stood the testimony before the chancellor; and if the balance of it does not incline in favor of the bank, it must, at least, be deemed to be doubtful, and to form a proper case for a jury. It was, therefore, the exercise of a sound discretion in the court below, to award an issue.

The issue was tried, and the jury found that Eden did not receive notice till the ninth of October, and the judge certifies in the usual form, that he was satisfied with the verdict. This verdict would then, probably, have been acquiesced in, and have put an end to the cause, if the judge, upon the trial, had not excluded Olcott, who was a witness on the part of the bank. On this ground, a new trial was moved for, and granted. The cause is, then, at last, narrowed down to this single point: Was Olcott a competent witness? If he was, it will scarcely be pretended but that a new trial was proper; for a verdict founded upon the exclusion of legal testimony, never can give satisfaction to the conscience of any court. It is impossible for us to say what weight the jury might have given to the testimony of Olcott, and whether a critical attention to it might not have turned the scale. The case of *Stace v. Mabbot*, 2 Ves. 553, is in point. Lord Chancellor Hardwicke granted a new trial, and observed "that the judge has declared he is well satisfied with the verdict, and if nothing appeared to me but what appeared to him thereon, I think I should have been of the same opinion. My opinion, therefore, in granting a new trial, is grounded upon new evidence, which was not before the jury, and which is material."

The objections to the competency of Olcott are: 1. That his name stood as defendant in chancery; 2. That he had been guilty of fraud in assigning to Roe, absolutely, a judgment which he took only as a collateral security, and that he might, in consequence thereof, be liable to costs in the suit in chancery. The reason assigned by the chancellor against the first objection appears to me to be very forcible. He considered it as an objection to a point of form merely, and that to conclude the party by it would be rigid. If a co-defendant disclaims or have no interest in the event of the cause, he may, by an order of the court of chancery, be examined as a witness, though his name be not struck out of the bill: 2 Chan. Cas. 214. It is a motion, of course, says Lord Hardwicke, *Man v. Ward*, 2 Atk. 228, to examine such a defendant. In another case, 1 Vern. 230, it is said that a co-party, who has no interest, or disclaims it, is a good witness, and it makes no mention about the order. I believe, however, it is the practice of the court to make such an order, and yet, as it is a matter of form, and granted of course, it would be most unreasonable to deprive a party forever of the benefit of testimony from so trifling an inattention. I am yet to believe that the judge might not even have dispensed with the order, and I am sure the appellants ought not to receive the countenance of this court in availing themselves of so frivolous an objection.

The second objection is of a more plausible kind, but, I think, equally destitute of any solid foundation. It is said that Olcott may possibly be made chargeable with costs, for his fraud, and that, therefore, he has an interest in the cause. If this position be granted, it will not disqualify him; for, notwithstanding the strictness of some old cases, the rule is now well settled that it must be a present, vested or certain interest, and not a remote, possible or contingent interest, that will disqualify a witness: Peake's Ev. 93; 1 T. R. 163. On this ground it has been held, 4 T. R. 17, that a parishioner who was liable to be rated in the poor rate, but was not, in fact, rated at the time, was a competent witness to prove the ratability of others. Of late, the inclination of the courts has been to confine the question of interest within strict and precise boundaries, and to let objections go more to the credit than to the competency of witnesses. The case cited by the appellants was that of *Barrel v. Gore and Umfreville*, 4 Atk. 401, where the court is made to say that if one defendant, who is offered as a witness for another, may, by possibility only, be liable for costs, he shall be ex-

cluded. But this is directly contrary to the more recent and rational principle which I have mentioned; and it is impossible that it can be liable to the extent there laid down. It can be shown by several cases that unless there can be a decree against a party, he cannot be made liable for costs. In *Piddock v. Brown*, 3 P. Wms. 288, which was a bill to impeach some bonds as obtained by fraud, one of the co-defendants was offered as a witness, and objected to on the ground that, though there could be no decree against him, yet, his answer being falsified in many parts, he might be liable for perjury; but Lord Chancellor Talbot laid down this general rule: that if a plaintiff has no equity, or, in other words, no ground for a decree against a defendant, he is a good witness; else it would be in the power of a plaintiff to take off all the defendant's witnesses by naming them as defendants in the action. Again, in the case of *Cotton v. Lutterell*, 1 Atk. 451; 2 Ves. 223, the bill was filed against Lutterell and Lady Cheshire, to be relieved against a settlement said to be obtained by fraud, and also to have a conveyance and account of profits, and Lady Cheshire was equally charged with the fraud. But her deposition was allowed to be read, and the chancellor said it was necessary to make her a defendant, for the purpose of discovery; but she could not be brought to a hearing, as she was no ways concerned in interest in the event of suit, and consequently no decree could be made against her. And if there be no decree against her, he observes, how is it possible that costs could be given against her? The charge of fraud against her went, therefore, only to her credit, and not to her competency. It would be difficult to find a case more applicable to the present, or where the reasoning is more conclusive. In *Barrett v. Gore*, the bill stated a breach of trust in one defendant, and prayed a specific performance against the other, and it appeared that the defendant, who was offered as a witness for the other, had grossly misbehaved in the trust, and a decree might, perhaps, be had against him, by compelling him to reassume his trust. But let that solitary and loosely-reported case read as it may, it appears that subsequent to all these cases, 2 Ves. 284, the decision in *Cotton v. Lutterell* was quoted and confirmed, and the court held that where nothing could be prayed against a co-defendant, he should be dismissed without costs; for that a person should not be brought before the court merely to pray costs against him. I think I have, therefore, abundantly proved that, as Olcott had no concern or interest in the present cause; that, as he was not brought to a

hearing, and no decree was prayed or could be had against him, he was not liable to be amerced in costs, and was, consequently, a competent witness for the bank, and ought to have been received at the trial.

There was an objection, also, made to the form of the order for a new trial, that it did not state that the chancellor had decided that Olcott was to be deemed a competent witness, notwithstanding both objections. This is a criticism almost too idle to deserve notice, and has no foundation in fact. The order does state that Olcott shall be admitted to be sworn as a witness notwithstanding his being a party in the cause, which reaches equally to both objections, for both arise from his being a party. I am accordingly, upon the whole view of the case, of opinion that the interlocutory order below ought to be affirmed, and the cause dismissed.

NICHOLAS, senator, concurred with chief justice Kent.

LIVINGSTON, J., having been of counsel, gave no opinion.

The majority of the court being in favor of reversal, it was decreed that the order complained of be reversed, and that the appellants receive the net proceeds of the sale of Eden's estate, on the *fieri facias* in favor of Wardell against Eden, and the costs in the court of chancery; and that the chancellor be directed to decide whether the appellants were entitled to interest.

The courts in New York have now fully accepted the doctrine asserted by Tompkins and Spencer, JJ., in this case, and the authority of *Davies v. Austen*, as to the rights of an assignee is now recognized. In the late case of *Trustees of Union College v. Wheeler*, 61 N. Y. 105, the doctrine and authority of the principal case are affirmed, and *Davies v. Austen*, recognized as sound. The court shows that in *Bush v. Lathrop*, 22 N. Y. 539, 540, the opinions of Tompkins and Spencer were preferred as authority. In the case of *Cutts v. Guild*, 57 N. Y. 233, the case is cited as a complicated one; but its doctrine is accepted that a *bona fide* holder of a chose of action takes it subject to all the equities between the parties.

It is cited in *Booth v. Farmers' Bank*, 4 Lans. 308, showing that satisfaction entered on record is valid as to innocent purchasers for a valuable consideration; and in *Ball v. Sprague*, 23 How. Pr. 242, on the proper ground for granting a new trial.

The chancery courts particularly notice it on the subject of relief under a general prayer. On this it is cited in *Wiltshire v. Marfleet*, 1 Ed. Ch. 657; *Colton v. Ross*, 2 Paige, 398; *Neilson v. McDonald*, 6 Johns. Ch. 205; *Latrod v. Boyle*, 2 Wis. 435; *Gildart v. Starke*, 1 How. Miss. 463.

GREENBY'S ADMINISTRATORS v. WILCOCKS.

[2 JOHNSON, 1.]

ACTION ON COVENANT OF WARRANTY.—The plaintiff in an action for breach of covenants for quiet enjoyment and warranty, must allege in his declaration that he was evicted by a person having the legal title.

COVENANT OF SEISIN NOT ASSIGNABLE.—If the grantor was not seised, the covenant of seisin is broken immediately, but no action can be brought by the grantee's assignee, on such covenant against the grantor, because after the breach it is a *chose in action*, and, therefore, not assignable.

ACTION upon the covenants in a deed. The declaration set forth a deed, dated August 30, 1792, by which the defendant conveyed certain lots of land to one Pollock, under whom the plaintiff's intestate claimed. The deed contained covenants on the part of the grantor, with the grantee, his heirs and assigns, that the grantor was seised in fee, and had right to convey, that the grantee should enjoy free from incumbrances, and a warranty against the grantor and his heirs and all persons whatsoever. The plaintiff then alleged that at the time of executing the deed, the defendant was not seised and possessed of any right, title, or interest whatsoever, of and in the said last described lot of land, but the title to the same lot of land was vested in one John H. Holland; nor had the defendant any lawful power or authority, to sell and convey the same as aforesaid; nor hath defendant secured and defended Pollock, or the intestate, Kellogg, or the plaintiff, or either of them, in the quiet possession of the said lot of land; but, on the contrary, Kellogg was, in his lifetime, on the fifth July, 1794, dispossessed of the lot; of all which defendant had notice.

Defendant demurred.

Hopkins, for the defendant. The breaches of the covenant are not well laid. The covenants of seisin and right to convey are broken as soon as made if the grantor has no estate in the premises: *Shep. Touch.* 170, tit. Covenant. The right of action vested immediately in Pollock, and was not assignable. Moreover, an assignee cannot bring covenant for a breach before his time: *Lewis v. Ridge*, *Cro. Eliz.* 863; 3 *Com. Dig.* Covenant, B. 3; 3 *Leon.* 31; 2 *Vent.* 278. The declaration does not show a dispossession by a lawful title, and to such only does the covenant extend: *Dudley v. Folliot*, 3 *T. R.* 584; *Moor*, 861; *Hob.* 34, 35; *Cro. Eliz.* 914; *Cro. Jac.* 425; *Vaughan*, 118; *Esp. Dig.* 301.

Gold, for the plaintiff. The covenant of seisin should be considered as running with the land; it is made for the benefit of the grantee, and the security of him and his assigns. Where a breach of the covenant continues an assignee may bring action: 3 Com. Dig. tit. Covenant, B. 3. The assignee, his representatives and assigns, may have an action of covenant: 6 Vin. Ab. tit. Covenant, K., pl. 12; *Id.* H. pl. 7; *Spencer's case*, 5 Co. 17; Bac. Ab. tit. Ex. and Adm. P., vol. 3, p. 96.

The breach of the covenant of warranty is sufficiently averred. The nature of the adverse title, or the manner of eviction need not be shown: *Foster v. Pierson*, 3 T. R. 617.

By Court, SPENCER, J. The plaintiffs' right to judgment must rest on the covenants of seisin, and power to sell and convey in fee-simple. The eviction stated in the declaration, does not appear, nor is it averred to have taken place by process of law; covenants for quiet enjoyment and a general warranty extend only to lawful evictions. Some of the cases, 3 T. 587; *Woodfall*, 232; Esp. Dig. 273, 274; *Wotton v. Hill*. 2 Saund. 177, and Wms. notes, 8 and 10, admit that the action lies for breach of covenant for quiet enjoyment, if the person to whom the right belongs oust the possessor. In the present case, it is not alleged that the ouster was committed by any person having right or superior title.

It is objected that the plaintiffs cannot recover on the covenants of seisin, and that the grantor had power to convey, because it is alleged in the declaration that there was a total defect of title in the defendant, at the time he executed the deed, and that the covenants then broken, could not be assigned over by the first grantee.

There is great force in this objection, and it appears to me conclusive. Choses in action are incapable of assignment at the common law; and what can distinguish these covenants, broken the instant they were made, from an ordinary chose in action? The covenants it is true, are such as run with the land, but here the substratum fails, for there was no land whereof the defendant was seised, and of consequence, none that he could aliene; the covenants are, therefore, naked ones, uncoupled with a right to the soil. This point was determined in the case of *Lewis v. Ridge*, Cro. Eliz. 863. The court held, in that case, that the covenant being broken before the plaintiff's purchase, and so, though the covenants were against the precise incumbrance, that it was a thing in action, which could not be transferred over, and judgment was given for the defendant on demurrer.

I cannot find that this case has been overruled. (The same rule is laid down by Comyns' Digest, title Covenant, B. 8.) Spencer's case presents a very distinct question from the one now under consideration; it involved only the case of an assignee of a term, sued by the lessor, with respect to the covenants, which, running with the land, are imposed upon the assignee.

I am, therefore, of opinion that the defendant must have judgment.

KENT, C. J., THOMPSON and TOMPKINS, JJ., declared themselves to be of the same opinion.

LIVINGSTON, J. I cannot assent to this opinion. One of the covenants declared on is that of a seisin in fee of the grantor. It since appearing that he was not thus seised, and, of course, that this covenant was broken immediately on executing the conveyance, it is now said that it could not be transferred, so as to entitle the assignee to an action for the breach of it.

One would naturally suppose that every covenant in a deed, conveying an estate of inheritance, would pass with the land, and confer on the owner, however remote from a former grantor, a remedy for an unsatisfied violation of any of them, without inquiring when the right of action first accrued. They all extend, by express terms, as well to assigns *ad infinitum* as to the first grantee. It comports, then, with the contract, and is in itself reasonable that they should all form a part of every grantee's security; nor can it be right that those who come in under this covenant, which may be the only one in a conveyance, shall not be able to recover any part of a large consideration merely because an alienation intervened prior to a discovery of any defect of title. By this means a most useful covenant, and in daily use, will become a dead letter before it can be enforced, as, very often, repeated sales take place before a title is discovered to be bad. We are, however, told that such is the law, and are referred to some authorities. Between the case of *Lewis v. Ridge*, Cro. Eliz. 863, and this one, there is a distinction, which will be an excuse for not applying it in a way that the court could not have intended, and which can answer no other purpose but that of depriving an innocent purchaser of his remedy, and of annulling (which courts sometimes take the liberty of doing) a contract to which the parties have solemnly bound themselves. The distinction is this: In the case from Croke, the covenant (which was to discharge all statutes, etc., in two years) was not only broken, but this was

known to the purchaser; for a statute, which was the incumbrance complained of, was matter of record, and the land, at the time of sale, was actually extended for its satisfaction. It was therefore thought that the plaintiff had bought a chose in action, and the court (which was less indulgent formerly than at present to the these bargains) set its face against him. But in cases of the kind before us, such knowledge can rarely exist; for as soon as a title is discovered to be questionable, there will generally be a stop to further alienation. The reasoning, therefore, in this case does not apply; for why punish a person for buying a chose in action, by a forfeiture of his remedy, when he neither knew, nor suspected at the time, that such a right existed? It might be asked: What makes a covenant more a chose in action after, than before, its breach? In all purchases in fee, has not the land always been considered, as it really is, the thing bargained for, and that the covenants, without distinction, necessarily pass with it? Thus we shall get rid altogether of the idea of purchasing a thing in action, which can only be entertained by a fanciful distinction between covenants broken and those which may be broken in future. Is there in reality anything more obnoxious or criminal in assigning the one than the other? If there be any turpitude in the thing, why do courts, now-a-days, go so far in supporting transfers of choses in action, as to protect the rights of an assignee, though not a party to the record? Another case, more recent, that of *Andrew v. Pearce*, 1 Bos. & Pull. (New Rep.) 158, which was also relied on, proceeded on the ground of the lease being absolutely void prior to its assignment, and that, therefore, no interest in the land could pass under it; of course, there remained only a right of action to sell. Now, though the party in that case ought, perhaps, to have been estopped from saying that nothing passed by his deed, yet taking this decision as we find it, and even receiving it, late as it is, as authority, it makes in favor of the plaintiff. From the judgment delivered by Sir James Mansfield, and the reasonings of all the counsel, it is evident that if any interest in the land had passed with the assignment, the covenant, whenever broken, would have passed with it, and the action been supported. If so, how does it appear that nothing passed by the deed of Wilcocks, or by the one to the plaintiffs' intestate? Though it was not a fee-simple (which must be the only meaning of the averment in the declaration), some smaller estate or interest may have passed, which would have carried the covenant of seisin along with it, and

been sufficient to take this case out of the principle of *Andrew v. Pearce*.

But this is not the ground on which I rest; it is that of the contract itself, by the words of which all the covenants passed to every grantee *ad infinitum*, and gave him, of course, an action in his own name, against any preceding grantor, whether a breach happen before or after the assignment, provided no satisfaction has been obtained for it in another name. Nor is it without authority that this ground is taken, for in the case of *Spencer*, 5 Co. 17, in Sir Edward Coke's reports, it was resolved, "that if the assignee of a lessee be evicted, he shall have a writ of covenant, for it is reasonable, if he be evicted, that he shall take such benefit of the demise as the first lessee might, and the lessor hath no other prejudice than that his especial contract with the first lessee hath bound him to." In this lease it is worthy of remark, too, that there was no express covenant, but only words which implied one. It is not stated, it is true, when the breach took place, but the lessor, without any such distinction, is placed in relation to the sub-tenant, on precisely the same footing, as it respected a remedy on the lease, as he stood in with regard to his immediate lessee. The court must have considered the contract of assignment as entire, and that with it not only the land, but all the agreements of the lessor, passed; for it is not easy to be understood how the covenant of warranty should pass to the grantee, as it is admitted it did, so as to give him a right to sue in his own name, and yet that a different rule is to be applied as to the covenant of seisin.

I concur in the opinion delivered as to the mode of stating an eviction, in which respect the declaration is imperfect; but the breach of the covenant of seisin being well assigned, the plaintiff, in my opinion, is entitled to judgment.

Judgment for the defendant.

See *Marston v. Hobbs*, ante, 61; and *Prescott v. Trueman*, ante, 246.

WARD v. CLARK.

[2 JOHNSON, 10.]

WORDS NOT ACTIONABLE IN SLANDER.—To say of a person, "He has sworn falsely," or "He has taken a false oath against me in Squire Jamison's court," or "He has falsely and maliciously charged and imposed on me the crime of perjury," is not actionable.

ERROR from the court of common pleas. The defendant in error brought an action of slander against Ward, and in his declaration set forth two counts. In the first count the words charged are, "He has sworn falsely; he has taken a false oath against me in Squire Jamison's court." The second count was for "falsely and maliciously charging and imposing on the plaintiff below the crime of perjury." Plea, not guilty; and general verdict for ten dollars damages.

Mumford, for the plaintiff in error. The words "swore falsely" do not amount to the crime of perjury; it does not appear that Squire Jamison was a justice of the peace, or had power to administer an oath: *Hopkins v. Beedle*, 1 Caines, 347 (2 Am. Dec. 191); *Gurneth v. Derry*, 3 Lev. 166; *Holt v. Scholefield*, 6 T. R. 691; *Onslow v. Horne*, 3 Wils. 186; Bac. Ab. tit. Slander, B. 3. The second count is bad; it should have stated the words constituting the perjury; yet if it be held good, the first is bad, and the verdict being general, judgment must be reversed: *Hopkins v. Beedle*, Doug. 730; 1 T. R. 153; 2 Id. 125.

Sedgwick, for the defendant in error, contended that the words of the first count were sufficiently definite to import the charge of perjury; and that judgment ought not to be reversed if any of the words in the first count were actionable: *Lloyd v. Morris*, Willes, 443. The general charge of perjury in the second count is sufficiently precise for the purpose of pleading: 1 Vent. 264.

By Court, **TOMPKINS, J.** The plaintiff in error relies on the insufficiency of the declaration in the court below, for the reversal of the judgment rendered there.

No colloquium, or averment of special damages, is contained in the declaration. The words in the first count, then, are not actionable, unless they must necessarily be understood as conveying a charge of perjury. This is not to be collected from them, because it does not appear that Jamison had any authority to hold a court known in law, or to act judicially, or to administer an oath, and, therefore, a charge of having taken a false oath before him, does not necessarily impute any crime, for which a person may be indicted and punished. Even if the court referred to by the words, were known and recognized by this court, there is no colloquium of any cause there depending, without which the declaration is insufficient; for the words may have been spoken in common discourse: *J. Cartmel v. Cole*, Freem. 55; *Core v. Morton*, Yelv. 28.

These words, "Thou art forsworn in collet court," without showing any action pending there, and without further description of the court, were held not to be actionable: *Skinner v. Trobe*, Cro. Ja. 190. In *Page v. Keeble*, Cro. Ja. 436, a similar judgment was given, upon a declaration upon these words: "Thou art perjured, for thou art forsworn in the bishop of Gloucester's court." The doctrine recognized in this court in the cause of *Hopkins v. Beedle*, 1 Caines 347 (2 Am. Dec. 191), goes the length of determining the question, upon the count now under consideration. It was there adjudged, that to convey the charge of perjury, the words must be certain and unequivocal, and state the court, or a competent officer who administered the oath; and in a more recent case, *Stafford v. Green*, 1 Johns. R. 505, a count for words similar to those in the first count in this declaration, was held to be defective. The rule in relation to these and similar words is, that where one person calls another a perjured man, it shall be intended that the same was in a court of justice, and to have a necessary reference to it; but for a charge of false swearing, no action lies unless the declaration shows that the speaking of the words had a reference to a judicial court or proceeding: *Croford v. Blisse*, 2 Bulstrode, 150; *Core v. Morton*, Yelv. 28.

The second count appears to me to be equally defective. It is not alleged what particular words were spoken; nor does the plaintiff pretend to set forth the substance of the expressions of which he complains. No precedent, ancient or modern, warrants this form of pleading. The plaintiff contents himself with drawing his own inference from the declarations made, and alleges such inference, without apprising the defendant of the words, or substance of the words spoken. The rule of evidence in actions of slander formerly was, that the plaintiff must prove the precise words; and that rule has been no further relaxed than to admit proof of the substance of the words laid. With respect to declaring, it has been repeatedly resolved, that it is not sufficient to set forth the tenor, effect or import of the words used: *Newton and others v. Stubbs*, 3 Mod. 72, and 2 Show, 436; *Hale v. Cranfield*, Crok. El. 645; Id. 857. No precedent for this count was cited upon the argument, and my researches have furnished me with none. In Morgan's Precedents, 268, is to be found the only form which bears a resemblance to this count. It was for charging and imposing upon the plaintiff the crime of arson, before a magistrate, to wit: Of maliciously and feloniously setting fire to a certain house, particularly described

therein. In 2 Richardson's Practice, K. B. 108, is the form of a declaration, charging the substance and import of the particular words used. Without questioning the correctness of these precedents, it is evident, that the same objections do not lie to them, as are presented, by this count. The generality and uncertainty of the charge is a decisive objection to it. By this mode of declaring, the defendant is deprived of an opportunity of pleading matter which he might properly set up (if he was apprised, by the declaration, of the specific words), as that they were spoken with reference to a different subject, or in a different sense, than that in which the plaintiff thinks proper to apply them: *Cromwel's case*, 4 Rep. 13. This he cannot do, if the mode of declaring, adopted by the plaintiff in the second count, is allowed. Besides, the defendant may thereby be deprived of the advantages which might result to him from a motion in arrest of judgment, or upon a writ of error. Upon the whole, we are of opinion, that the second count violates the rules of correct pleading, and leads to unnecessary surprise and vexation. The judgment below must, therefore, be reversed for the insufficiency of both counts in the declaration.

Judgment reversed.

See *Bue v. Mitchell*, 1 Am. Dec. 258.

MANNY v. HARRIS.

[2 JOHNSON, 24.]

RECORD OF FORMER SUIT AS EVIDENCE.—In order that the record of a former suit should be received as conclusive evidence to any point, it should appear that such point was put in issue. Extrinsic evidence cannot be received showing that a particular matter, not in issue on the record, was submitted to the consideration of the jury.

TENDER ON BOND.—A tender on a bond with a penalty is no bar to an action on such bond.

ACTION of debt on a bond, dated May 25, 1800, and reciting that Harris, by virtue of an agreement with Manny, was in possession of one hundred and twelve acres of land which had been leased to Manny by one Lefferts, deceased, with a reservation of ten pounds three shillings and ten pence; the lease containing the covenant that, if at the expiration thereof, Manny, his heirs or assigns, should pay the lessor one hundred and forty-five pounds and twelve shillings, that then the lessor would convey the land to Manny by a sufficient warranty deed.

The condition of the bond was, that if Harris paid Manny the yearly rent specified in the lease, and also the sum of one hundred and forty-five pounds and twelve shillings by the first of September, 1802, then the bond was to be void. Plea *non est factum*, with notice that defendant would give in evidence that in an action brought by Harris against Manny, before the commencement of the present suit, the bond in question was necessarily considered by the jury, and had been allowed and deducted from the amount of Harris's demand against Manny; further that the bond was given on condition that Manny should procure by the first of October, 1802, a good and sufficient deed of the land to Harris from the representatives of Lefferts, but that no such deed had been procured; and further, that on the twenty-eighth May, 1801, defendant paid plaintiff the interest on the one hundred and forty-five pounds and twelve shillings, and on the twenty-sixth May, 1802, before the commencement of this suit, tendered the interest then due, which was refused; and on the first of September, 1802, tendered the sum of one hundred and forty-five pounds and twelve shillings, and interest, according to the condition of the bond, which plaintiff refused to accept.

The defendant proved that on the twenty-sixth of May, 1802, he went to plaintiff's house, when he was informed that plaintiff had gone to New York, and after counting out the money due on the bond, went away, there being no person ready to receive the same. He also proved that he tendered the one hundred and forty-five pounds and twelve shillings and interest, on the first of September, 1802, to plaintiff, who refused to accept the money, saying defendant should not have the land, as another had got it. The defendant then offered in evidence the record of the suit of Harris against Manny, and the testimony of a juror in that case, to prove that the amount of the bond sued on in this, had there been allowed and deducted. This evidence, though objected to, was admitted; and it appeared from the record that the former action had been on a penal bond in the sum of two thousand and five hundred dollars conditioned to procure to Harris from the representatives of Lefferts a deed of the land in question; and the juror testified that the amount of plaintiff's claim in the present action had been allowed in making up the verdict in the action brought by Harris.

On behalf of the plaintiff, it was proved that plaintiff's brother had been authorized to attend to his business, and was at plaintiff's house on the twenty-sixth of May, 1802, with the

bond, but no tender was made to him; and that prior to the commencement of this suit, plaintiff demanded the money of the defendant, who refused to pay it, saying that it had been allowed plaintiff in another action.

The jury found for the defendant; and plaintiff moved to set aside the verdict; because, 1. Evidence was improperly admitted; 2. The tenders were not sufficiently proved; and, 3. The subsequent demand and refusal destroyed the effect of the tender.

Hildreth and Van Vechten, for the plaintiff. In the previous suit, the tender was the only point put in issue, and the record is not evidence of matters not in issue, and which the jury had no right to consider: *Sintsenick v. Lucas*, 1 Esp. Cas. 43. To make the maxim *nemo debet bis vexari* apply, the suit must be for the same cause of action: *Kitchen v. Campbell*, 3 Wils. 304, or the same point in issue. The tender on the twenty-sixth of May was not good. Harris should have remained at plaintiff's house till sunset: 6 Bac. Ab. 453; nor does a tender discharge the debt: *Id.* 457; Plowd. 172, 173; the money should have been paid into court, to keep the tender good: 6 Bac. Ab. 460, 464.

Henry, for the defendant. A tender to a bond with a penalty is in bar of the action: 3 T. R. 683; *Douglas et al. v. Patrick*, 1 Esp. Cas. 449; 5 Com. 649; Pleader, 2 W. 28; Carth. 133. The plaintiff has once received what he is attempting to recover in this action. If the jury did make a deduction of the consideration money in the former suit, it must be considered as so much money had and received to his use. In *Church v. Bedient*, Caines Cas. in Er. 21 (2 Am. Dec. 263), though no set-off was pleaded, the actual residue was held to be the amount of damages.

By Court, SPENCER, J. To defeat the plaintiff's recovery, the defendant's counsel rely on two points:

1. That on the trial of the suit, in which Harris was plaintiff, and Manny defendant, the jury allowed the money claimed in the action.

2. That the defendant, having once tendered the principal and interest due on the bond now in suit, the plaintiff's remedy to maintain an action for the penalty is gone, notwithstanding the plaintiff, after the tender, and before the institution of the suit, demanded the money tendered.

The only point in issue in the former suit, was, whether

Harris had, or had not, paid and tendered the moneys due, to entitle him to a deed for the land contracted to be sold. That point ~~was~~ decided by the jury in favor of Harris, and they gave him a verdict for six hundred and sixty-two dollars and fifty cents as damages, for not making the conveyance. It is, therefore, only necessary to inquire, whether that issue warranted the giving the present bond in evidence, so that the jury might allow it to the plaintiff; for if the issue did not embrace the consideration of the present cause of action, evidence ought not to have been received that the jury did decide upon it. This principle is not only a plain dictate of common sense, but has frequently been recognized. In the case of *Sintzenick v. Lucas*, 1 Esp. Rep. 43, Lord Kenyon lays it down, that to make a record evidence to conclude any matter, it should appear that the matter was in issue, which should appear from the record itself; nor should evidence be admitted, that under such a record, any particular matter came in issue. In the case of *Kitchen et al. v. Campbell*, 3 Wil. 308, Lord Hardwicke says: "It is the test to know, whether a final determination in a former action, is a bar or not, to a subsequent one, where the same evidence will support both the actions." It does not appear from the record, that the former issue, in any shape, comprehended this cause of action, and, consequently, the proof admitted at the time was improper.

There is no analogy between this case and that of *Church v. Bedient*, Caines's Cases in Error, 21 (2 Am. Dec. 263); there the assured went for a total loss, holding in his hands the proceeds of the very subject insured, nearly equivalent to the loss claimed. Though the court of errors did not decide that the proceeds, without any notice of set-off, ought to go in diminution of the recovery, yet I think it ought to be so. In this case, there are two distinct bonds; one for the absolute payment of a sum of money by the defendant; the other for the conveyance of a tract of land, on the payment of the money; and the remedy, on a breach of either of the conditions, was distinct also.

The second point is attended with no difficulty. There is a dictum in *Carthew*, 133, that if tender be on a bond, with a penalty, the plea is in bar of the action. The only possible reason for this was that the penalty on a forfeiture of the condition, became the debt, and might be recovered. At present it is not so considered, and on payment of the sum in the condition, the court will order satisfaction. The reason having ceased, the law must cease with it. I doubt, however, whether

this was the law, that a tender, in case of a penal obligation, took away the remedy on the obligation. A case in 2 Rolles Abr. 524; 6 Bac. Ab. 457, has a different aspect. It appears by the present case, that prior to the commencement of this suit, the plaintiff demanded the money, which was not paid. Though there had been a previous legal tender, so as even to bar a suit on the penalty, this, I think, revived the remedy. The court are, therefore, of opinion that a new trial ought to be awarded, with costs to abide the event of the suit.

New trial granted.

JACKSON v. KNIFFEN.

[2 JOHNSON, 81.]

DECLARATIONS OF TESTATOR.—Parol evidence of a testator's declarations made subsequent to the execution of the will, and shortly before his death, are not admissible to show that he executed the will through fear and duress.

EJECTMENT. The lessors of the plaintiff claimed title to the premises as the heirs at law, and by conveyance from the heirs at law of David Kniffen, who died in January, 1804. The plaintiff proved title *prima facie*. The defendant then offered in evidence the will of David Kniffen, dated February 1, 1801, and executed in presence of three witnesses. After sundry small bequests to his children and grandchildren, the testator devised the remainder of his estate, real and personal, to the defendant, his wife, in fee. The will was proved by a subscribing witness. The plaintiff then called witnesses to prove duress in obtaining the will. It appeared that the testator had been possessed of considerable real and personal property during his lifetime; had advanced to his children small sums of money; that the defendant was testator's second wife, by whom he had no issue, and that they were married twenty years before his death. The testator was about eighty years of age at the time of his decease. During the time between the first of February, 1801, and his death, testator was guarded and watched by his wife and Undrell Merrit, who lived in the house, and to whose daughter one hundred and twenty-five dollars was bequeathed by the will, and testator's children were debarred from having free access to him, with a view, as witnesses supposed, to prevent him from altering, or making another will. The plaintiff then offered to prove, by one of the subscribing witnesses to the will and four other persons, that the testator, on many occa-

sions, in conversation with them, whom he considered as his friends, since the making of the will, had uniformly, and in the most earnest manner, declared that instrument not to be his will; that he had been forced to execute it, for he should have been murdered if he had not; and called on these persons to bear witness to what he declared, and particularly requested the subscribing witnesses not to prove the execution of the will, which had been kept in the custody of Joseph Morey, one of his executors, ever since its execution. He offered to prove further, that the testator, during his last illness, and within an hour before his death, while expecting immediate dissolution, in a solemn manner called on a person then present to bear witness that the instrument was not his will, but had been extorted from him through fear of being murdered; and that his desire was to make an equal distribution of his estate among his children; the testator, also, then declared, as he had often done before, that he had requested Morey to surrender the instrument to him that it might be canceled, but Morey always refused to do so.

This testimony was rejected, and plaintiff submitted to a nonsuit. A motion was now made to set aside the nonsuit and for a new trial. The case was submitted without argument.

THOMPSON, J. This case was submitted to the court without argument. It appears that the right of the respective parties, to the premises in question, depends on the validity of the will of David Kniffen, under which the defendant claims. The lessors of the plaintiff contend that the will is void. To establish this they offered, upon the trial, to prove certain parol declarations, by the testator, after the due execution of his will, some of which were made a few hours before his death, purporting that he had executed his will through fear and compulsion, and that he revoked the same. This testimony was overruled, and the question now presented is, whether it was competent evidence, and ought to have been admitted. The other circumstances given in evidence, tending to show that the testator, when he executed the will in question, was under improper restraint, might have been submitted to the jury; but on the rejection of the parol declarations of the testator, the plaintiff submitted to a nonsuit. In whatever point of view the testimony offered is considered, I cannot but think that it was properly overruled. It could not, if placed in the strongest possible terms, amount to a revocation, without a direct violation of the statute, which declares that no will (of land) shall be revoked,

or altered, except by writing, executed with all the requisites of a will, or by canceling the same. If these declarations were not to operate as a revocation, I am at a loss to see in what manner they could affect the will. To say that they were proper, in order to show that the instrument in question was not duly executed, by reason of its having been signed under duress, is assuming the very point which was to be proved. If they were legal evidence, they must be so, when standing alone, unaided by any of the circumstances previously proved. That the declarations were made a few hours before the death of the testator, can add nothing to their efficacy; for surely he could not be considered as standing in the character of a witness, even admitting the declarations of a witness in *extremis* to be admissible in any case. This will might have been executed under circumstances which ought to invalidate it; but to allow it to be impeached by the parol declarations of the testator himself, would, in my judgment, be eluding the statute, and an infringement upon well settled and established principles of law: 1 Vezey, 440; 5 Co. 69; 2 P. Wms. 136. The only case that has fallen under my observation, which looks like countenancing, in any measure, testimony of this kind, is that of *Nelson v. Oldfield*, reported in 3 Vernon, 76. We have, however, but a very imperfect statement of the case there given; and the point before the court to be decided was, whether a will of personal estate, which had been proved in the spiritual court, could be controverted in the court of chancery. It is true, the reporter observes, that by the depositions of witnesses examined in the cause, the complaints of the testatrix, during her last sickness, respecting the means by which she had been induced to execute her will, were stated; but no objection appears to have been made to the evidence. The defense relied upon was the conclusiveness of the probate. The admissibility of the testimony not being the point before the court, this cannot, in my opinion, be considered an authority to control the present case. To permit wills to be defeated, or in any manner whatsoever impeached, by the parol declarations of the testator, appears to me repugnant to the very genius and spirit of the statute, and not to be allowed. My opinion, therefore, is, that the motion must be denied.

KENT, C. J., declared himself to be of the same opinion.

LIVINGSTON, J. I concur in the opinion just delivered; though on the first reading of this case, my impressions were that the

testator's declarations, made in the moment of expected dissolution, should have been received, to establish the duress under which he acted. On more mature reflection, I am satisfied that they were properly rejected. Besides the danger of tampering with a person, who may be known to have made his will, of fraud, in making use of some loose and unguarded expression to set it aside, and of perjury, in fabricating declarations, which may never have been made, and thus revoking a will by parol, the right of cross-examining is invaluable, and not to be broken in upon. How often is testimony, which, when first delivered, appears conclusive and irrefragable, entirely frittered away by this process. So much so, that a witness, well sifted, not unfrequently proves more against, than in favor of the party that produces him. If one eye-witness be worth more than ten hearsay witnesses, a still higher value must be set on proofs made in presence of both parties, compared with *ex parte* declarations. In one way, the whole truth comes out; in the other, no more than it may suit the witness or his friend to have disclosed. The not being under oath, although a serious objection, is not with me, the greatest, because, admitting everything said to be true, so long as it is in the absence of one, and probably, at the solicitation of the other party, it should go for nothing. In what way the will was extorted, what menaces were used, why he was afraid of being murdered, whether in consequence of threats, or of his own idle suggestions or dreams, why he had not, in the course of three years canceled a will unduly obtained, with many other inquiries which a public examination might have suggested, would have afforded the jury a much fairer chance of arriving at the truth. If the declarations of dying persons are ever to be received (on which, if *res integra*, much might be said), it will be best to confine them to the cases of great crimes, where frequently the only witness being the party injured, the ends of public justice may otherwise, by his death, be defeated. In civil cases they should never be admitted; or, if admitted at all, not to avoid a will regularly executed. Credit is not always due to the declarations of a dying person, whose body may have survived the powers of his mind, or whose recollection, if his senses are not impaired, may not be very perfect, or who, for the sake of ease and to get rid of the importunity and teasing of those around him, may say, or seem to say, whatever they choose to suggest. In the case cited from Vernon, if such testimony were received, it passed *sub silentio*, and therefore

amounts to nothing. The conclusiveness of the probate appears to have been the only question before the chancellor.

SPENCER, J. [After reviewing the evidence rejected.] The whole case turns upon the legal effect of the proof given at the trial, and offered to be given, that the will was obtained by duress.

A will, whether of real or personal estate, cannot be revoked since the statute of 29 Charles II, by words alone. In this view, the parol evidence was inadmissible; but it is essential to the validity of every deed, that the party making it be free from restraint, and not under duress: Dyer, 143; 6 Powell, 173, and the cases there cited. A will, therefore, may be avoided by duress, as well as any other deed.

The only remaining question is, whether evidence should have been received, to prove the declarations of the deviser, and I think it ought. A will takes effect only on the testator's death. During his life, it is subject to his control, and until it was consummated, by his death, no one had, in a legal view, any interest in it: *Nemo est heres viventis*. Declarations of facts by a party in interest, when made at a time when no one had a vested interest in opposition to him, are good evidence, and they are very distinguishable from those made by a party in interest, repugnant to the vested rights of others. An obligor in a bond, or a grantor in a deed, cannot make declarations of a duress, so as they can be evidence, because they go to take away a vested and opposing interest. This very kind of evidence was admitted, and without a question, in the case of *Nelson v. Oldfield*, Vernon, 76. There Mrs. Bettison was gotten into the power of Mrs. Nelson, and was prevailed upon to make her will, and solemnly swear, that she would not revoke or alter it, or make any other will; she declared all these facts, and that she dare not, for fear of damnation, revoke or alter her will. The devisee brought her bill for the aid of the court of chancery, relative to a trust estate, and on the evidence of these declarations alone, the chancellor refused his aid and dismissed the bill. As well on principle as precedent, I think the evidence offered should have been admitted, and especially, after it was proved, that the deviser had been guarded and watched over, after the date of the will; that it had been taken out of his custody, and detained, notwithstanding his application for it, for the purpose of canceling it, and that his children were denied access to him. I apprehend no danger under a state of facts like those presented in this case, from admitting

such proof; but though I feel myself compelled to dissent from the majority of the court, it is with diffidence. The principles I have adverted to, and the justice of the plaintiff's case, have operated to produce a conviction on my mind, that the nonsuit ought to be set aside.

TOMPKINS, J., was of the same opinion.

Rule refused.

This is regarded as a leading case on the subject of the admission of a testator's declarations in evidence in an inquiry respecting his will. To it, most all our cases refer, and, except in one instance, the courts have accepted its authority. It will be useful now to examine the subsequent adjudications on this subject. It will be observed that in the examination of the question, the court had no previous authority in this country to refer to, and but little light from the English cases. Since, we have had many decisions on this particular subject, most of them referring to this case as the starting point. Before proceeding further we will here state what principal cases of importance may be examined, and which we shall regard as the best authoritative exposition of the law at present, and which, it will be found, notice the principal case. The first well considered case is *Reel v. Reel*, 1 Hawks, 247, which denied the authority of the principal case, and was decided in 1821. The next were *Stevens v. Vancleve*, 4 Wash. C. C. 262, decided in 1822; *Comstock v. Hadlyme*, 8 Conn. 254, decided in 1830. After these there are three cases, which, from the elaborate examinations given to the decisions, may truly be regarded as leading cases. These are: *Waterman v. Whitney*, 11 N. Y. 157; *Boylan v. Meeker*, 4 Dutch. 274, and *Shailer v. Bumstead*, 99 Mass. 112. The most elaborate examination given to the subject is in *Boylan v. Meeker*, but the best and the most philosophical decision of the question is in the opinion of Selden, J., in *Waterman v. Whitney*. There, the subject is admirably presented, and discussed under three different heads. "It will tend to elucidate the subject," he says, "to consider it under the following classification of the purposes for which the evidence may be offered, viz.: 1. To show a revocation of a will admitted to have been once valid; 2. To impeach the validity of a will for duress on account of some fraud or imposition practiced upon the testator, or for some other cause not involving his mental condition; 3. To show the mental incapacity of the testator, or that the will was procured by undue influence." If to this classification we add two others, namely: to show the existence or contents of a lost will, and to explain a latent ambiguity, or to rebut an equity, we have a full presentation of the various ways in which the question can arise. We will, therefore, consider the question under these five heads:

1. TO SHOW A REVOCATION.—After an examination, the position is laid down in *Waterman v. Whitney*, that upon a question of revocation no declarations of the testator are admissible, except such as accompany the act by which the will is revoked, such declarations being received as part of the *res gestæ*, and for the purpose of showing the intent of the act. This position is unquestionably supported by authority. The English cases of *Bibb v. Thomas*, 2 W. Bl. 1044, and *Doe v. Perkes*, 3 Barn. & Ald. 489, fully sustain this position, as does *Dan v. Brown*, 4 Cow. 483, where Wood-

worth, J., says: "The execution of the will being established, the next question is whether there was any evidence that it was canceled. On this point I lay no stress upon the declarations of the testator. They were made long after the execution of the will, and shortly before his death. They are not evidence unless they relate to the *res gestæ* or to an act done; as where by mistake the will is torn or thrown into the fire."

In *Harring v. Allen*, 25 Mich. 505, in a suit to test the validity of an alleged will, the questions arose as to whether the deceased had not destroyed the will in such a manner as to revoke it, and whether the will was not originally procured by undue influence; and the declarations of the deceased manifesting dissatisfaction with the dispositions of the will, though not made at the time of the alleged acts of spoliation, were held competent evidence as to the question of the destruction of the will, and upon the intent of the acts. The decision can only be accepted as authority on the ground that the question of undue influence was raised; for then the evidence is allowed to take a wider range, and subsequent declarations of a testator are admissible, as will hereafter be shown. It may also be sustained on another ground; because in the case the question of the existence of a will was raised. The court say: "The plaintiff in error also offered to give in evidence declarations of decedent, manifesting dissatisfaction with the dispositions of the will, which expressions, however, were not made at the time of the imputed acts of spoliation. The testimony was excluded on objection of defendant in error. Was this evidence admissible for any purpose? We are to keep in mind the fact that the will, whose former existence was denied, was after all missing; that plaintiff in error claimed, and had given evidence tending to show that decedent had voluntarily destroyed it; and, on the other hand, that defendant in error did not admit the alleged destruction. There was, then, a question upon the truth of the statement that decedent had destroyed the will, and also a question upon his intent to revoke. Now, any declarations of decedent adapted to disclose the state of his mind on the subject would have borne upon the credit due to the statement that he tore the will, and also upon his state of mind and intent in tearing the will, if he did tear it. Any free, intelligent and distinct expressions manifesting approbation or disapprobation of the will, would have furnished more or less aid to the jury in their endeavors to ascertain whether, in fact, he did or did not tear the will, and whether, if he did so, it was done with intent to revoke. For these purposes I think the inquiry was authorized."

2. WHERE FRAUD, MISTAKE, OR IMPOSITION IS ALLEGED.—The cases generally hold that in this instance no subsequent declarations of a testator are admissible in evidence. This is the position maintained in the principal case, which in this respect has since been accepted as authority, notwithstanding it was dissented from in *Reel v. Reel*, 1 Hawks. 247. The leading English case on this head is *Provis v. Reed*, 5 Bing. 435, decided in 1829. There evidence was sought to be introduced of declarations of the testator after the execution of the will, showing the will to be invalid. This evidence was held inadmissible. The same doctrine is laid down in *Smith v. Fenner*, 1 Gall. 170, and subsequent declarations rejected where a will was impeached for fraud. Story, J., says: "The declarations of the testator made before, and at the execution of the will, are admissible in evidence to prove the point. And so declarations made after the execution of the will, if so near the time of the execution as to be considered part of the *res gestæ*, or necessarily connected with it. But I

shall not admit any other subsequent declarations of the testator, because such declarations are in the nature of hearsay, and have never been held admissible in any case within my recollection." To the same point *Stevens v. Vancleve*, 4 Wash. C. C. 262; *Comstock v. Hadlyme*, 8 Conn. 254, holding that the declarations of a testator, unless a part of the *res gestæ*, were not admissible for any purpose except to prove his mental condition at the time of executing the will: *Moritz v. Brough*, 16 Serg. & R. 403; *Boylan v. Meeker*; *Waterman v. Whitney*, *supra*; and *Tawney v. Long*, 76 Pa. St. 115. Selden, J., sums up the result of his examination in *Waterman v. Whitney*, by saying: "These cases must, I think, be sufficient to establish the position that declarations of a testator made either before or after the execution of the will are not competent evidence to impeach its validity on the ground of fraud, duress, imposition, or other like cause."

3. IN CASE OF INSANITY OR UNDUE INFLUENCE, the evidence takes a wider range, and here the subsequent as well as the prior declarations of the testator are admissible. This is fully borne out by *Waterman v. Whitney*; *Shailer v. Bumstead*; *Boylan v. Meeker*; *McTaggart v. Thompson*, 14 Pa. St. 149; *Dennis v. Weekes*, 51 Geo. 24. There is not in this instance the same objection to the evidence as in the other cases as being hearsay. For this purpose it is direct and primary. The principal fact to be established is the mental condition of the testator at the time of making his will; and for this purpose evidence of his declarations, previously and subsequently, directly bears on the question, and must be relevant and competent. The criticism of Selden, J., in *Waterman v. Whitney*, on the statements of Greenleaf in his work on evidence is very just. Speaking of the confusion of the authorities, he says: "Mr. Greenleaf, in his work on evidence, in treating of the invalidity of wills, in consequence of the insanity or mental imbecility of the testator, says: 'In the proof of insanity, though the evidence must relate to the time of the act in question, yet evidence of insanity immediately before or *after* the time is admissible. Suicide, committed by the testator soon after making his will, is inadmissible as evidence of insanity, but it is not conclusive.' And in the same section, he adds: 'The declarations of the testator himself are admissible only when they were made so near the time of the execution of the will as to become a part of the *res gestæ*,' and he refers for the last proposition to *Smith v. Fenner*, *supra*; 2 Greenlf. Ev., sec. 690. Nothing could be more incongruous than the different branches of this section. To say that the insanity of the testator subsequent to the making of the will may be proved, but that the declarations of the testator are inadmissible for the purpose of proving it, is not a little extraordinary. It admits the fact, but excludes the most common and appropriate evidence to establish it."

In *Reel v. Reel*, 1 Hawks, 247, evidence was admitted where duress and incompetency of the testator was charged subsequent to the execution of the will. The court, in this case, dissented from *Jackson v. Kniffen*, and from *Smith v. Fenner*; but on the distinction pointed by Selden, J., there was no necessity for this, for as there was a question as to the capacity of the testator in *Reel v. Reel*, the evidence was properly admitted on that ground.

4. THE EXISTENCE AND CONTENTS OF A LOST WILL.—In *Jackson v. Betts*, 6 Cow. 376, evidence of the declarations of a testator, showing the existence of his will, was offered, and that the deceased repeatedly declared, during his last illness, and in *articulo mortis* to the executor that he had left

his will and codicil in his desk, and stated where the key was left. This evidence was objected to and rejected at the trial. As to this, the court, Sutherland, J., says: "The declarations of the testator during his last sickness as to the existence of his will, and the place where it would be found, were incompetent evidence and were properly rejected." This case afterward went to the court of errors, 6 Wend. 173, and on this point Chancellor Walworth doubted the correctness of the ruling. He says: "The supreme court on a former occasion decided that the circuit judge had correctly rejected evidence of the declaration of the testator, in his last sickness, recognizing the then existence of the will, and directing as to the place where it might be found. As that question could not be raised or argued in this cause, I have not examined the subject sufficiently to have made up a definite opinion thereon; and probably I ought not now to express such opinion, even if I had no doubts on the subject. I will therefore only say, that in the investigations of the other questions in this cause, I have necessarily been compelled to look into this subject so far as to see there is sufficient doubt as to the correctness of the decision of the supreme court on that point to authorize them to direct a re-argument of the question, if it shall again come before them."

The authority of *Jackson v. Betts*, 6 Cow. 376, on this point may therefore be very well doubted. In *Harring v. Allen*, 25 Mich. 505, the evidence was received. But this whole question has lately undergone an elaborate examination in England, in the now celebrated case of *Sugden v. Lord St. Leonards*, 1 P. D. 154; 17 Eng. R. 453. In the able opinion of Cockburn, C. J., the questions for examination are thus stated: "Several questions arise upon this state of facts. In the first place, was the will destroyed by the testator *animo revocandi* or not; secondly, can secondary evidence be given of the contents, and lastly, if the evidence is satisfactory, so far as it goes, but not altogether complete, ought probate to be granted so far as the evidence which we have before us shows what were the contents?" The declarations of the testator were, therefore, admitted in evidence as to the fact of his having made certain testamentary provisions in the will, and that it contained his last disposition. On this point, the chief justice says: "Long after March, when he was stricken with his last illness, and from which time he was confined to his own bed-room, he again and again referred to the various provisions he had made by the will; in other words referred to the will itself as still subsisting, and this again adds to the vast improbability of his having destroyed the will. The only conclusion I can arrive at is, not that he destroyed it, but that it was clandestinely got at by somebody, and surreptitiously taken away; who that somebody is, is one of those mysteries which time may possibly solve, but which at present it would defy human ingenuity to say."

The next question examined and decided was, whether the statements made by a testator as to the provisions of his will can be received as evidence of the contents of a will known to have existed; but which, at his death, is no longer forthcoming; and the chief justice, passing on this, says: "I am, therefore, of opinion that the various statements of Lord St. Leonards, whether before or after the execution of his will, are admissible to prove its contents."

5. IN EXPLANATION OF PROVISIONS.—It is a well settled rule that a testator's intention must be, if possible, gathered from the "four corners of the instrument," and where the language speaks for itself, no evidence of his own or any other can be admitted to control the instrument. But to

this there are two well established exceptions. For instance, to explain a latent ambiguity, his declarations are admissible: *Cotton v. Smithwick*, 66 Me. 360; *Ordway v. Dow*, 55 N. H. 11; 1 Greenlf. Ev. sec. 290. And in *Redfield on Wills*, 540, it is said: "But there are many well defined exceptions to the rule rejecting the declarations of the testator in testamentary causes. There is, in chancery, a recognized rule that where the testator gives his creditor a legacy equal to or larger than the debt, and of the same quality as the debt, that being due, it is *prima facie* in discharge of the debt. The rule has not been looked upon with much favor, and all conceivable exceptions to it have been allowed, and the declarations of the testator in regard to his intentions have been received to rebut the presumption."

NOBLE v. SMITH.

[2 JOHNSON, 52.]

REQUISITE OF GIFT INTER VIVOS.—To constitute a valid gift, there must be an immediate delivery of possession of the thing given to the donee, or what is equivalent to actual delivery, as the delivery of a key, or some such means of obtaining the use and command of the subject.

GIFT NOT COMPLETE.—Where a person told another he gave the latter the corn growing in a certain field belonging to him, it was not sufficient without a delivery to the donee; and if the latter afterwards, when the corn is ripe, enter the field and cut and carry away the corn, he will be considered a trespasser.

TRESPASS. The plaintiff proved that he held possession of the premises by virtue of an execution issued on a judgment against one Hallett, and that he was in possession at the time of the trespass complained of. It was proved that the defendants broke and entered the plaintiff's close, and, though forbidden by plaintiff's overseer, cut and carried away nearly two hundred bushels of wheat in the straw. A witness testified that Hallett had lived on the farm as tenant to Hill, plaintiff's principal, for more than two years before plaintiff was put into possession; that two of the defendants were Hallett's step-sons; that witness had applied to plaintiff to let Mrs. Hallett have some of the wheat then growing on the premises, for seed, and plaintiff told witness that "he would give the wheat growing to the defendants, the Smiths, for the support of themselves and Mrs. Hallett, and would procure a written surrender to be drawn up for Hallett to execute." The Smiths afterwards requested plaintiff to give them a deed of the wheat, which he refused to do, saying "that he would reserve it for them, if he should demise the premises to any other person." Another witness testified that plaintiff told him he had revoked the gift to the Smiths on account of some offense they had given him.

The judge charged the jury that there was sufficient evidence of a valid gift of the wheat, not revocable by the plaintiff. The plaintiff submitted to a nonsuit, and subsequently moved for a new trial for misdirection of the judge.

Henry and Van Vechten, for the plaintiff. There was only a promise of a gift; it was a mere gratuitous promise, and is revocable: *Dyer*, 490. To make a perfect gift, it must be accompanied with possession and take effect immediately: *Bl. Com.* 441, 442; 2 *Str.* 954; *Jenkins' Cent.* 109.

Woodworth, attorney-general, for the defendants. Delivery of possession does not mean actual or manual possession, but such a delivery as is consistent with the nature of the thing. There is no evidence that the gift was conditional.

By Court, *KENT*, C. J. This case presents the following questions: 1. Can property in corn, growing, be transferred by gift? 2. Is there here the requisite evidence of such a gift?

After a consideration of this case, I am satisfied that the opinion which I gave at the circuit, upon the trial of this cause, was incorrect.

Lord Coke is reported to have said, in *Wortes v. Clifton*, 1 *Rol. R.* 61, that by the civil law, a gift of goods was not valid without delivery, but that it was otherwise by our law. This is a very inaccurate dictum, and the difference between the two systems is directly the reverse. By the civil law, a gift *inter vivos*, was valid and binding without delivery: *Inst. lib.* 2, tit. 7, sec. 2; *Code*, lib. 8, tit. 54, l. 3, 35, sec. 5; but at common law, it is very clear, from the general current of authorities, that delivery is essential to give effect to a gift: *Bracton*, *de acq. rerum dom.*, lib. 2, fol. 15, b. 16 a; *Noy.* 67; *Str.* 955; *Jenkins*, 109; 2 *Black Comm.* 441. In the analogous case, also, of gifts *causa mortis*, it was held by Lord Hardwicke, in the case of *Ward v. Turner*, 2 *Vezey*, 431, where the subject underwent a very full discussion, that a delivery was necessary to make the gift valid; and, accordingly, that a delivery of receipts for south sea annuities, was not a sufficient delivery to pass these annuities by that species of gift.

Delivery, in both kinds of gift, is equally requisite on grounds of public policy and convenience, and to prevent mistake and imposition.

If delivery be requisite, there was none in the present case. The land, at the time of the alleged gift, was in possession of

one Hallett, and not of any of the defendants, to whom the gift is said to have been made; and before the wheat was ripe, the plaintiff recovered the possession of the land, by due course of law. Here was not even an attempt at a symbolical delivery, and giving the testimony the strongest possible construction in favor of the defendants, it amounted to nothing more than saying: I give, without any act to enforce it. A mere symbolical delivery would not, I apprehend, have been sufficient. The cases in which the delivery of a symbol has been held sufficient to perfect the gift, were those in which it was considered as equivalent to actual delivery, as the delivery of a key of a trunk, of a room or warehouse, which was the true and effectual way of obtaining the use and command of the subject: 2 Vezey, 442, 443; 4 Brown, 286; Toller's Law of Exs. 181, 182. I do not know that corn, growing, is susceptible of delivery in any other way than by putting the donee into possession of the soil; but it is not necessary to give any opinion, at present, to that extent; nor do the court mean to do so. It is sufficient to say, that there was no evidence of delivery in the present case, and that, to presume one, we must go the whole length of the example given in the Roman law, where the buyer is supposed to take possession of a large immovable column, by his eyes and his affections, *oculis et affectu*: Dig. 41, 42, 1, 21. The courts of equity seem to have adopted the true rule in their decisions, on the *donatio causa mortis*, in which they hold, that the delivery must be actual and real, or by some act clearly equivalent.

The opinion of the court, therefore, is that the nonsuit be set aside, and a new trial awarded, with costs to abide the event of the suit.

New trial granted.

BEATTY v. THE MARINE INSURANCE CO.

[2 JOHNSON, 109.]

CORPORATE ACTS, HOW PERFORMED.—Where the act incorporating an insurance company provided that no losses should be settled and paid without the approbation of at least four of the directors, with the president or two assistants, or a plurality of them, the acceptance of an abandonment made by the insured for a total loss will not be a valid corporate act, unless it appears to have been done at a board of directors constituted according to the act, for a corporate body can only act in the mode prescribed by the act of incorporation.

ACTION on a policy of insurance. The defendants admitted that plaintiff was entitled to recover a partial loss; and plaintiff admitted that he was not entitled to recover for a total loss unless defendants had accepted the abandonment before the suit was brought. The only question was as to the acceptance of the abandonment.

It appeared that the plaintiff's agent, upon hearing of the capture, duly abandoned, and left the papers relative to the capture at defendants' office. That the agent called several times to see whether defendants would pay a total loss or not; and at one time the secretary of the company, after going into a room where the president and assistants were convened, returned and told the agent that the president and assistants had agreed to pay a total loss, and asked the agent the amount claimed. The agent then gave a statement to the secretary, who carried it to the next room, returned, and said the loss was passed, and asked the agent to call at another time and take a note payable in sixty days, with interest, stating that he, the secretary, was too busy then to make it out. This was assented to, and on calling again, the agent was told that the company would not pay a total loss.

The jury found, that the president and assistants had authorized the secretary to inform the agent of the plaintiff, that the company had agreed to pay a total loss; and if that be an acceptance, and the defendants be bound by it, damages are assessed at twenty-six hundred and sixty-six dollars and twenty-four cents; if not, then damages are assessed as for a partial loss in the sum of four hundred and fifteen dollars and seventy-five cents. The principal question for consideration was the authority of the action of the president and assistants in this manner to do a valid act. The act incorporating the company provided that "no money on losses arising on any policy shall be paid without the approbation of at least four of the directors, with the president and his assistants, or a majority of them."

Riggs, for the plaintiff.

Colden and Sampson, for the defendants.

By Court, THOMPSON, J. The only question in dispute between the parties is, whether there was a valid and binding acceptance of the abandonment made to the underwriters. To determine this point, recurrence must be had, in the first place, to the act incorporating the Marine Insurance Company, in

order to ascertain who were empowered to accept an abandonment and adjust the loss. It will there be found that the authority of the president and assistants extends to making insurances, subscribing policies, fixing premiums, and taking notes for the same; but that no money or losses shall be paid unless with the approbation of at least four of the directors, with the president and his assistants, or a majority of them, having first made a board for that purpose; which board, by a plurality of voices, may pay, settle and adjust all such losses, or other moneyed transactions as may come before them, and the same shall be binding on the corporation. The defendants being a body corporate, the general and invariable rule is that such body can act only in the mode prescribed by the law creating it. To enable its agents to bind the company, they must act pursuant to the requisites of the incorporating act: 2 Cranch. 166. It only remains to inquire whether, in the present case, the abandonment was accepted by the authorized agents of the company. I think it was not. No part of the case will warrant an inference that any of the directors were present at the time of the alleged acceptance. When the plaintiff's agent called to know the determination of the company in relation to the payment of the loss, he says the secretary went into the room where the president and assistants were convened, and the answer returned was that the president and assistants had agreed to pay a total loss; but no mention is made of any of the directors being present or assenting to it. When the testimony is positive as to the persons by whom the acceptance was made there is no room left for presumption; if any of the directors were present, so as to make the act binding on the company, the plaintiff ought to have shown it affirmatively. We are of opinion, therefore, that the acceptance not having been made by the agents constituted by the act of incorporation, cannot be binding on the company. The plaintiff must have judgment for the amount of the partial loss only; which, according to the finding of the jury, as stated in the case, is four hundred and fifteen dollars and seventy-five cents.

Judgment for the plaintiff.

BUYS v. GILLESPIE.

[2 JOHNSON, 115.]

WORDS NOT ACTIONABLE.—To charge a married woman with adultery is not *per se* actionable; and to render such charge actionable, special damage must be alleged and proved.

Action of slander. The words spoken by the defendant charged the plaintiff's wife with adultery, and were variously laid in seven counts; but no special damages were alleged. On a motion in arrest of judgment, the only question was, whether the words spoken by the defendant, and amounting to a charge of adultery were, in themselves, actionable.

Foot. for the defendant. To support this action the words must import some crime for which the plaintiff would have been punishable. By the common law, adultery is not an indictable offense: 7 Mod. 79; 2 Salk. 552, 693, 694, 695; 2 Show. 25, 302; Doug. 380, in note; *Stevison et. ux v. Jones*, 2 T. R. 473.

Allen and Henry, for the plaintiff. It is not necessary that the crime charged should be an indictable offense, in order to render the words actionable. It is sufficient if they occasion some temporal loss or damage: *Onslow v. Horne*, 2 Wils. 186. In this state, an adulteress not only loses her dower, but may be deprived of all support out of her husband's estate, and be forever disabled from marrying a second time: Laws of N. Y., vol. 1, p. 93. To call an heir apparent a bastard is actionable, though it be not alleged that he lost his estate or suffered any other special damage: 1 Rol. 37; 2 Id. 249.

By Court, KENT, C. J. This is a motion in arrest of judgment. The suit was for charging the plaintiff's wife with adultery; but no special damages were laid, and the question is, whether words to that effect be of themselves actionable.

It is very clear that they are not actionable by the English law. All the cases of actions for that species of defamation arise either upon the custom of the city of London, where lewdness in a woman exposes her to corporal punishment, or by reason of special damages specifically laid. During the time of the English commonwealth, when fornication and adultery were made crimes cognizable by the civil magistrate, it was indeed held, Hard. 107, that calling a woman a whore was actionable; but after the restoration, the new ordinances were abro-

gated, and the former decisions revived: 4 Co. 16; 1 Roll. Abr. 34, pl. 45; Sty. 352; 1 Roll. Abr. 36, pl. 40; 1 Lev. 134; Comb. 391; 2 Ld. Raym. 1004. The only point before us, then, is, whether our statute relative to divorces has, in respect to this action, made any new rule of law applicable. If it has not, we can only say, with Lord Holt, 5 Mod. 104; Comb. 392, that "such words are a great scandal, and for which, if we could, we would encourage an action; but the law has ordained otherwise."

An adulteress is liable to be prosecuted in chancery by her husband, and upon proof of the fact of adultery, the chancellor is directed to dissolve the marriage, and make such allowance to the wife as he shall deem proper; and the party convicted of adultery is prohibited to re-marry, and every such re-marriage is declared void: Laws of N. Y., vol. 1, p. 93.

This is the only notice that our law takes of the sin of adultery.

In England, adultery is a cause of divorce only, *à mensa et thoro*. By this qualified divorce, the wife does not lose her dower, but neither party can re-marry; and the wife, although entitled in the spiritual court to alimony, is not entitled to administration on her husband's estate, nor will chancery decree her a distributive share: Prec. in Chan. 111; 3 Salk. 138; Bacon, tit. Dower, c. 1.

The only essential difference, then, between the punishment of adultery in England and in this state is, that here it is punished by an absolute divorce, and consequently on the part of the wife, with the loss of her dower. But the loss of dower ought, in my opinion, to be specially stated in the declaration; for it does not necessarily follow that the husband was seised of any estate whereof the wife could be endowed. Whether this special averment of loss would be sufficient, it is unnecessary to say; but certainly we cannot otherwise take notice of this particular damage. In the case of *Humphries v. Strutfield*, 1 Roll. Abr. 39, pl. 5, it was held that to call the plaintiff a bastard was actionable, because of the temporal damage; but there was an averment that the plaintiff was heir apparent, and that his father was seised of lands, and by reason of the words intended to disinherit him. Though there is some confusion in the cases and *dicta* on this point, the better opinion undoubtedly is that to call the son and heir apparent a bastard, is not actionable without assigning special damages: *Nelson v. Staff*, Cro. J. 422; 1 Vin. 396, pl. 18; 2 Vent. 26, 28. In the

case of *Randle and Beal*, 1 Roll. Abr. 34, pl. 45, it was held that the averment of the danger of a divorce was not any temporal loss. The temporal damage arising from the loss of the right of dower, is too remote and contingent, unless it appear affirmatively that the husband was seised of an estate of inheritance. It is not enough for a single woman to aver generally a loss of marriage, but she must state some particular marriage which she has lost by means of the slander: *Hunt v. Jones*, Cro. J. 499. As to the other inconveniences resulting from the conviction of adultery, they seem to be as great in England as with us; yet the charge is not of itself actionable. I have not thought it necessary to consider the act, Laws of N. Y. vol. 1, p. 123, which adjudges common prostitutes to imprisonment, as disorderly persons, because the words used in the present case did not go to charge the plaintiff's wife with that offense. The judgment must, therefore, be arrested.

Judgment arrested.

TALCOT v. COMMERCIAL INSURANCE Co. OF N. Y.

[2 JOHNSON, 124.]

PRESUMPTION OF UNSEAWORTHINESS. — A vessel sailed with a fair wind and moderate weather, and in the evening of the same day suddenly sprung a leak, in consequence of which she foundered without any apparent cause or extraordinary accident to account for the leak. It was held in an action on the policy, that the loss would be presumed to have arisen from her unseaworthiness at the time of sailing, and therefore the insured could not recover.

ACTION on a policy of insurance on the cargo of the brig *Hunter*, at and from Middletown, in Connecticut, to Martinique, and at and from thence to New York, with liberty to touch at two other ports in the West Indies, against sea-risks only. The only question was as to the seaworthiness of the vessel.

The following facts appeared: The *Hunter* arrived at Haddam, on the Connecticut river, November 16, 1804, and having taken on board a cargo of staves, hoops and shooks, cleared out at Middletown, the port of entry, for Haddam, and set sail on the first of December, 1804. She passed the bar at the mouth of the river on the fourth, and in the evening, while off New London, the tide being unfavorable and the anchorage insecure, her master put into New London to anchor for the night. On the next morning she set sail with a moderate wind blowing from the north-west, and a considerable sea running, and con-

tinued her voyage until ten o'clock the same evening, when a leak was discovered. The pumps were set to work and all hands engaged in freeing her from water, when, after an hour, the leak had increased so much that it was thought prudent to make towards the land, which was done. The pumping was kept up until one o'clock the next morning, when the leak was found to be still increasing, and in about an hour after, the vessel filled with water and upset. The crew were taken from the wreck the following day by another vessel and carried to Newport. The brig was eight or nine years old, built of the best materials, and considered a very good vessel. The master had sailed in her eight voyages before. Immediately before the commencement of the voyage insured, she was graved and caulked, and underwent all the repairs that were thought necessary. In the opinion of the master, she was tight, staunch and strong, and in every respect well fitted for the voyage. At the time the leak was discovered there was a pretty heavy sea running, though the master did not consider the wind as blowing hard when the discovery was made. The cause was not known; it did not appear that the vessel had struck ground, or met with any accident that could occasion the leak. In the opinion of the master, the leak did not proceed from any rottenness or want of soundness; it might have been occasioned by the starting of a butt or forewooding, in which case it could not have been well secured at the time of sailing, as there had not been sufficient wind to start a butt, if well secured. The mate testified that he believed the vessel defective when she sailed, and assigned as a reason, the springing a leak under such circumstances.

Upon a verdict for the plaintiff, a motion was made for a new trial.

Colden, for the defendants, urged that there must have been some defect in the vessel to have occasioned the leak, and that the implied warranty of seaworthiness had been broken: *Marshall*, 368.

P. W. Radcliff and Riggs, for the plaintiff, relied upon the case of *Patrick v. Hallett*, 1 Johnson, 241, as settling the point, that the sudden springing of a leak was a peril within the policy, and not, of itself, evidence of unseaworthiness. The accident of a sudden leak is a matter of fact for the jury to decide under all the circumstances adduced: *Barnewall v. Church*, 1 Caines, 217 (2 Am. Dec. 180).

By Court, SPENCER, J. A motion has been made in this case for a new trial, on the ground that it is a verdict against evidence. The only question presented is, whether the vessel was seaworthy at the time of the insurance, or, in other words, whether she was "tight, staunch and strong."

The charge of the judge who tried the cause, is not detailed; of course, we are to presume that it was unexceptionable, and that he submitted the broad question of seaworthiness to the jury as a matter of fact for them to decide. The question now presented is not free from difficulties, notwithstanding the case of *Patrick v. Hallett & Bowne*, on which the plaintiff's counsel have relied as decisively in their favor. It is an undeniable proposition, that in every insurance there is an implied warranty on the part of the insured, that the vessel is not only free from defects, as well latent as others, but that she is competent to perform the voyage, and to encounter the ordinary perils of the sea. The insurer is only liable for losses arising from the extraordinary and unforeseen perils of the voyage.

There are three leading circumstances in the case of *Patrick v. Hallett & Bowne*, which distinguish that case from this: The first is, that there a demurrer to evidence was interposed, and Mr. Justice Livingston, in giving the opinion of the majority of the court, lays stress on that circumstance, in saying: "If there was any evidence from which a jury might have drawn the conclusion of seaworthiness, it is admitted by the demurrer." The second arises from the difference of age between the two vessels. The *Peggy* was but two years old when she was lost, and built of the most durable materials, whilst the present vessel was between eight and nine years old; and certainly, the presumption of latent defects from decay, is much stronger in this case than in the other. The third essential distinction arises from the fact that the *Peggy* was shown, not only to be tight, strong and staunch, when she sailed on the voyage, but to have been admitted to be so on the record by the assurers three months before her loss. There being such a material difference in the circumstances between the case relied on and this, that I feel myself at liberty to inquire, whether the loss of this vessel did not proceed from latent defects, and not from any extraordinary and unforeseen perils of the sea. It has been urged by the plaintiff's counsel, that every vessel insured is *prima facie* to be deemed seaworthy. This argument has, in all probability, had great influence on the jury. I remember it to have been strongly insisted on, upon a former trial in this cause, in

which the jury could not agree, and were discharged. This presumption is founded on the benignity of the law, which will not presume a party to have violated his implied stipulation; but when a state of facts is presented, from which a conclusion is to be deduced, in my opinion, this presumption of seaworthiness deserves no consideration. "For when," says Marshall, 2 Marshall, 365, "the ship becomes innavigable, or incapable of proceeding on the voyage insured, all the writers agree, that the presumption shall be that this proceeded from the age and rottenness or other defect of the ship, unless it be made to appear to have been occasioned by sea-damage, or some unforeseen accident."

From the peculiar circumstances in the case of *Patrick v. Hallett & Bowne*, I think the presumption mentioned by Marshall was countervailed; in the present case, it appears to me not to be repelled; for though the jury have found this vessel seaworthy, I think there was no legal evidence of the fact; and the conclusion on my mind is irresistible, "that she died a natural death." The case of the *Amy and Letitia*, Marshall, 369, is very much like the present; that vessel, after being out one day, without any bad weather, became very leaky, and was obliged to run for a port; and it was admitted on all sides, that it was a case of unseaworthiness. Lord Mansfield nonsuited the plaintiff, and it was acquiesced in.

In the present case, there is no adequate cause shown to produce the injury which led to the loss, arising from extraordinary and unforeseen perils; there is not a fact counteracting the presumption of the innavigability of the vessel from internal defects, probably produced by the pressure of the cargo and the action of the seas, but without the concurrence of any other than ordinary accidents.

Without encroaching on any rule laid down in regard to new trials, it seems to me, that to grant one in this case is essential to the due administration of justice, and to the maintenance of a most salutary principle, that assurers take upon themselves the risk, upon the possibility of gaining the premium, when, in this case, from the vessel's being incapable of performing the voyage, there was no possibility of their gaining the premium; the consideration failing, the obligation ceases.

We are of opinion that there ought to be a new trial, on payment of costs.

New trial granted.

SMITH, ADMINISTRATOR, v. SMITH.

[2 JOHNSON, 235.]

PROMISSORY NOTE AS EVIDENCE UNDER MONEY COUNTS.—A resident of Rhode Island gave his promissory note, dated in Massachusetts to a person residing there, by which he promised to pay forty pounds in certain lands, at nine shillings per acre. Afterwards, the maker obtained his discharge under an insolvent act of Rhode Island, and removed to New York. He admitted to the representatives of the payee that he would not convey the land, and promised to settle the note. In an action brought against him for money lent and advanced, it was held that the note was admissible in evidence under the money counts, and as connected with the acknowledgment it was sufficient evidence of consideration.

CONTRACT, HOW GOVERNED.—The law of the place where the contract is made, and not where the action is brought, should govern in expounding or enforcing the contract, unless the parties intended its execution elsewhere, in which case it is to be governed by the law of the place where it is to be executed.

DISCHARGE UNDER INSOLVENT LAWS.—A debtor residing in Rhode Island gave his note, dated in Massachusetts, to a resident of that state. It was held that the debtor's discharge under the insolvent law of Rhode Island was not a bar to a suit by the creditor in New York, as it would be no bar in Massachusetts.

ASSUMPSIT. The declaration contained two counts: for money lent, and for money paid, laid out and expended for the use of the defendant by the intestate in his lifetime, at Mendon, in the county of Herkimer. Plea, *non-assumpsit*, and the statute of limitations, with notice that defendant's discharge from all his debts, under an act of insolvency of the general assembly of Rhode Island, the twenty-seventh of January, 1797, would be given in evidence under the first plea.

A verdict was taken subject to the opinion of this court upon the following statement of facts:

On the trial, the plaintiff produced a note signed by the defendant, in the following words:

“ I, for value received, promise to pay Calvin Smith, or order, forty pounds, silver money, to be paid in lands at nine shillings per acre, in the township of Franconia, in the state of New Hampshire; said Smith to have his choice in any one lot that I purchased of David Thayer, and to have a good warranty deed of said land when requested, the same to be on interest till paid. Mendon, June 13, 1788.” Defendant admitted the making of the note.

A witness for the plaintiff testified that in June, 1804, he

called on the defendant in behalf of one Adams, to whom letters of administration on the estate of the intestate had been granted in Massachusetts prior to the present administration; that he showed the note to defendant, who acknowledged it to be a just debt, and that he would see the plaintiff soon, and settle with him. The defendant also said that he had been deceived by Thayer, of whom he had purchased the land mentioned in the note; that he had discovered that Thayer had no title in the lands, and he, defendant, was now unable to convey the land.

Calvin Smith, the intestate, lived in Mendon, in the state of Massachusetts, in 1788, and continued there till his death. The defendant formerly resided in the same place, and plaintiff's witness thought the defendant did not change his residence until after 1788; but a witness for defendant testified that he removed to Rhode Island about 1787, where he resided ten years, and then removed to New York.

Defendant's discharge under the act of the legislature of Rhode Island, the twenty-seventh January, 1797, was proved.

Ford, for the plaintiff. 1. The note may be given in evidence under the general counts of *indebitatus assumpsit* for money lent, etc.: *Clerke v. Martin*, 2 Ld. Raym. 757; 3 Burr. 1525; 2 Str. 725; the statute of Anne did not alter the common law, but merely gave an additional remedy; and the note taken in connection with the acknowledgment, is sufficient to entitle the plaintiff to recover: 1 East, 58, note; 7 T. R. 241; 2 W. Bl. 1269. 2. It is not necessary to prove the value of the lands; the note is *prima facie* evidence of their value, and the subsequent acknowledgment of the debt removes all objections. 3. The discharge of the defendant in Rhode Island is no bar to the action here: *Van Raugh v. Van Arsdaln*, 3 Caines, 154 (2 Am. Dec. 259); *Smith v. Buchanan*, 1 East, 6. But admitting the discharge to be valid, the subsequent promise to pay the debt is sufficient to support the action: *Trueman v. Fenton*, Cowp. 544; 1 P. Wms. 620.

Gold, for the defendant. 1. A note, like the present, payable in land, is not evidence of money received; it is not a promissory note: 2 Ld. Raym. 757; 1 Salk. 124, 125, 129; 12 Mod. 380. The plaintiff might declare on it as a special contract, but must prove the consideration: *Carlos v. Fancourt*, 5 T. R. 482; *Lansing v. McKillip*, 3 Caines, 286. The mention of forty pounds in the note is no evidence of the receipt of that sum, as

it is merely adopted to fix the number of acres at nine shillings per acre; and the legal measure of damages is the value of the thing at the time the contract is broken: *Dutch v. Warren*, 2 Burr. 1110, 1111; Buller's N. P. 132. 2. The new promise to take the case out of the statute must be made to the plaintiff: *Sarell v. Wine*, 3 East, 409; 2 Ld. Raym. 1101; 6 Mod. 309; 1 Salk. 28. This court does not recognize the acts of an administrator appointed in another state. 3. In no case has the precise question before the court been passed upon. In *Van Raugh v. Van Arsdaln*, *Smith v. Buchanan*, 1 East, 6; *Miller v. Hall*, 1 Dallas, 229; *Pedder v. McMasters*, 8 T. R. 609; and *Potter v. Brown*, 5 East, 124, the courts lay stress on the fact that the *locus fori* and the place of the plaintiff's residence were the same. Here the parties are citizens of other states. Moreover, the contract was presumably made with a view to its performance in Rhode Island, where the defendant resided; the discharge would be a good defense there.

By Court, THOMPSON, J. The material questions presented by this case are, whether the note or instrument in writing was admissible evidence in support of the money counts in the declaration; and whether the defendant's discharge, under the insolvent act in Rhode Island, is a bar to the present suit.

1. It would, I think, be a sufficient answer to the first question, that no objection was made, upon the trial, to the competency of this evidence. Independent of this circumstance, however, the testimony, in my judgment, was admissible in support of the money counts. The note is not for the payment of money, absolutely, and, therefore, not a negotiable note within the statute, and to be declared upon as such. No doubt appears to have existed in England, prior to the statute of Anne, that under a general *indebitatus assumpsit*, a promissory note might be given in evidence. It has since been held that the statute only gives an additional remedy, but does not take away the old one. It may not be admitted as sufficient without further proof of the consideration: 3 Burr. 1525; 2 Ld. Raym. 758; 12 Mod. 380; 3 Term. 181; 2 Wm. Black. 1271; which, in the present case, is full and satisfactory from the defendant's own acknowledgment. In June, 1804, when the note was presented to him for payment, he declared it was a just debt; that he owed the money, and would endeavor soon to settle it. This is also sufficient to remove all difficulty on account of the statute of limitations: 2 Wm. Black. 1271. The defendant also

declared that he had been deceived by Thayer, of whom he purchased the lands mentioned in the note; that he supposed Thayer had a title to the lands, but afterwards found that he had not; and that he, the defendant, was unable to convey the lands agreeably to his note.

The case of *Dutch v. Warren*, cited and adopted as law by Lord Mansfield, in the case of *Moses & Macfarlan*, 2 Burr. 1011, is very analogous to the present. The defendant, Warren, had executed a writing to Dutch, whereby he acknowledged to have received a sum of money, as the consideration for some shares in certain copper mines, and containing a promise to transfer the shares as soon as the books should be opened. On failure of doing it an action was brought, and the writing admitted as good evidence, under the count for money had and received.

2. The more important question in this case relates to the operation of the defendant's discharge, as an insolvent debtor, in the state of Rhode Island, subsequent to giving the note in question. The contract was made in Massachusetts, the intestate being at the time a permanent resident there. Some doubt appears in the case, as to the residence of the defendant at the time he gave the note, whether it was in Massachusetts or Rhode Island. This, however, is unimportant, as it respects the result of my opinion. I am willing to admit, what is certainly most favorable to the defendant, that his residence was in Rhode Island. Had the intestate been a citizen of this state, and the contract made here, the discharge in Rhode Island would be no bar, within the decision of this court, in the case of *Van Raugh v. Van Arsdaln*, 3 Caines, 154 (2 Am. Dec. 259). That case is conformable to what is now considered as the settled rule in England, that a discharge under a foreign bankrupt law, is no bar to an action for a debt arising in England, to a creditor residing there also: 1 East, 6. But we are called upon now to declare the effect of a discharge upon a demand where the contract was not made here, nor the creditor a resident here. If the contract had been made in Rhode Island, the parties both residing there, I should think we ought to apply the same rule to them here that would have been applied to them, had the prosecution been in that state.

The reasoning of all the elementary writers, and the decisions of courts of justice, have had a tendency to establish it as a general rule that the determination of questions founded on contract, depend chiefly on the place where the contract was made: 2 Huberus, 13, 1 tit. 3, p. 26; 3 Dal. 370; Stra. 733; 2 Burr. 1078; Black. Rep. 234, 256; 1 H. Black. 684.

Lord Mansfield, in the case of *Robinson v. Bland*, Black. R. 258, says, the general rule established, *ex comitate et jure gentium*, is, that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract, unless the parties have a view to its being executed elsewhere; in which case it is to be considered according to the laws of the place where the contract is to be executed. In the case of *Quin v. Keefe*, 2 H. Black. 553, the reasoning of the counsel, and which was adopted by the chief justice, goes very far in establishing that a bankrupt's certificate is to operate upon a contract according to the laws of the place where the contract was made. If this be a correct rule, and applied to the case before us, I apprehend that there can be little doubt that the defendant's discharge will be unavailable here. If the same rule prevails in Massachusetts as in our own courts on this subject, the question is settled by the decision in *Van Raugh v. Van Arsdaln*; and that it does, is to be collected from the adjudications of the courts of that state and of the United States.

In the case of *Grenough v. Emory*, in the circuit court of the United States for the district of Massachusetts, 3 Dal. 369, it appeared that the debt was contracted in Massachusetts, where both parties resided at the time. The defendant afterwards removed to Pennsylvania, and was discharged under the bankrupt act of that state. On his returning to Massachusetts on a visit, he was arrested for the debt, in the state court; the cause was removed to the circuit court of the United States, when the defendant pleaded his certificate; but it was held to be no bar to the action. The same principle has been recognized in the supreme court of Massachusetts, in the case of *Proctor v. Moore*, 1 Mass. 198; so that we may safely conclude, that if this suit had been brought in that state the defendant would have been held liable, notwithstanding his discharge in Rhode Island. It appears to be pretty well settled, both in England and in our own courts, that a *cessio bonorum*, under the laws of the place where the debtor is domiciled, will not operate as a discharge from his creditors universally. And, if so, I know no more just or equitable rule, than to apply the *lex loci*, where the contract was made, or was to be executed.

3. The defendant can have no reason to complain of the rule of damages adopted on the trial; from his own confession, he must have received from the intestate, the full sum mentioned in the note, and the least he can expect is to refund that sum with the interest, according to the laws of Massachusetts.

Judgment must accordingly be given for the plaintiff.

Judgment for the plaintiff.

The authority of this case on the question of contracts, and the effect of a discharge in bankruptcy is well recognized in the federal courts. See *Cox v. United States*, 6 Peters, 203; *United States v. Garlinghouse*, 4 Ben. 201; *Fitch v. Remer*, 1 Bis. 339; *Reimedyk v. Kane*, 1 Gall. 375; *Adams v. Storey*, 1 Paine, 106; *Lonsdale v. Brown*, 4 Wash. 155; *Le Roy v. Crowninshield*, 2 Mas. 162.

Story, in his *Conflict of Laws*, sec. 235, noticing the case, says: "The most important, or at least most frequent, cases of discharges of contracts occurring in practice, are those of discharges arising from matters *ex post facto*; such as a discharge from the contract upon the subsequent insolvency or bankruptcy of the contracting party. And here the general rule is, that a discharge from the contract according to the law of the place where it is made, or where it is to be performed, is good everywhere, and extinguishes the contract. This doctrine was fully recognized in the English law by Lord Mansfield (and it doubtless had a much earlier existence), in a formula of language which has been since often quoted as a general axiom of jurisprudence. 'It is a general principle,' said he, 'that where there is a discharge by the law of one country, it will be a discharge in another.' The expression is too broad, and should have the qualification annexed which the case before him required, and which has been uniformly understood, namely: that it is a discharge in the country where the contract was made or was to be performed. And so it was interpreted by Lord Ellenborough in a much later case. 'The rule,' said he, 'was well laid down by Lord Mansfield, in *Ballintine v. Golding*, that what is a discharge of a debt in the country where it was contracted, is a discharge of it everywhere.' This doctrine is also firmly established and generally recognized in America."

JACKSON v. CATLIN.

[2 JOHNSON, 243.]

SHERIFF'S DEED WITHIN STATUTE OF FRAUDS.—A sale of land by the sheriff is within the statute of frauds, and it is necessary there should be a deed or note in writing, specifying with certainty the lands sold, in order to pass the estate.

DEED AS AN ESCROW.—Where the sheriff executed a deed for land sold at auction, and delivered it to the attorney of the plaintiff in the execution, to be by him delivered to the grantee as soon as the purchase-money should be paid; it was held to be an escrow, and that until the condition be performed the estate continued in the judgment-debtor.

ESTATES UPON CONDITION, HOW AFFECTED BY ATTAINDER.—By the act of attainder of 1779, estates upon condition did not become forfeited to, or vest in the people of the state; and accordingly, where a person had purchased land at a sheriff's sale, but had not paid the money, and afterwards became attainted under the act, it was held that the state could not perform the condition so as to make the deed which had been delivered as an escrow absolute, and thereby acquire the right of the person attainted.

EFFECT OF PRIVATE STATUTE ON THIRD PARTIES.—Where by a private act of the legislature the property of a person is directed to be sold or disposed of, and the money realized to be paid to certain creditors, it must be understood as saving the rights of third persons, and can only amount to a quitclaim of the right or interest of the state.

EJECTMENT. It was admitted that the plaintiff's lessors were the heirs-at-law of George Croghan, who derived title to the premises under patent from the state, dated January 16, 1770. The defendant, to show a title out of the lessors, produced in evidence a judgment against Croghan in favor of William Peters, docketed December 15, 1773, upon which execution was issued, and levied upon the premises in question. Defendant also gave in evidence a deed, dated November 9, 1774, from the sheriff who had levied the execution, conveying to Thomas Jones, in fee, the premises; from which deed it appeared that the lands were exposed for sale in July, 1774; that Jones was the highest bidder, and purchaser; and that on the ninth of November, 1774, the deed was executed by the sheriff. By the testimony of a subscribing witness, it was shown that the deed was, after its execution, delivered to James Duane as an escrow, to be delivered to Jones whenever he paid the consideration money expressed in the deed. This deed, together with a release of a certain mortgage on the premises, was recorded November 11, 1794. This evidence, though objected to, was admitted.

The plaintiff then read in evidence an act of the legislature, passed March 22, 1788, which, after reciting the petition of William Peters, setting forth his judgment against Croghan, the sheriff's sale and the delivery of the deed as an escrow, the failure to pay the purchase-money, and his inability to compel payment of the money by reason of the war and the attainder of Jones, enacted that it should be lawful for the surveyor-general to sell the lands, satisfy the claims of the judgment creditors of Croghan, and pay the residue into the treasury; providing expressly, that the deeds on the sales by the state should not operate as a warranty. Plaintiff further gave in evidence a deed, dated September 8, 1795, from the surveyor-general to Duane, reciting a sale on the seventh of January, 1789; and also a deed, dated November 9, 1795, from Duane to certain trustees appointed by Peters. It was in evidence that the defendant was tenant under these trustees.

The attainder of Jones, by the act of the twenty-second of October, 1779, was admitted.

A verdict was taken for the plaintiff, subject to the opinion of this court, upon a case containing these facts.

Henry and Harison, for the plaintiff. Nothing passed by the sheriff's sale to Jones. A sheriff has no authority to sell on credit; the sheriff took the precaution to deliver the deed as an escrow, but he held no writing of Jones that would compel him to complete the purchase, and a sheriff's sale is within the statute of frauds: *Simonds v. Catlin*, 2 Caines, 61. In this case the fee was in Croghan and his heirs, until the condition of the escrow was performed. By the act of attainder in 1779, Jones became civilly dead, but his attainder vested the state with no right to perform the condition and acquire title to the land: *Winchester's case*, 3 Co. 2 b, 4 b; *Englefield's case*, 7 Co. 11; Latch, 107. By the act of 1788, the legislature merely intended to convey such title as was in the state, if any, and never meant to transfer the right vested in the heirs of Croghan.

KENT, C. J. If the state had no right, they could grant none. We do not wish to hear the plaintiff's counsel on that point.

Platt, Gold, Hoffman and Pendleton, contra. A sale by a sheriff upon credit is not void; the only effect of such sale is to make the sheriff liable in case of loss. But this was not a sale on credit; moreover, any such objection should come from the creditor, not from the debtor. Nor was the deed delivered as an escrow; Duane was not a stranger, but the attorney of Peters. The sale was unconditional and divested Croghan of the property, and it made no difference whether the purchase-money was paid or not. But if the delivery of the deed be deemed to be as an escrow, yet the condition has been performed by the state, in whom Jones's right vested by reason of his attainder, and the delivery of the deed has relation back to the original purchase, and enures to the persons rightfully claiming under the grantee.

By Court, KENT, C. J. The title of the lessors of the plaintiffs, as heirs to Croghan, having, in the first instance, been made out, the merits of the defense depend on the legal operation and effect of the sheriff's sale, in 1774, and of the sale by the surveyor-general, under the act of the twenty-second of March, 1788.

I shall first consider the effect of the sale by the sheriff. This sale was made at auction, in July, 1774, and a deed was executed on the ninth of November following, in favor of Jones,

the purchaser, and delivered to James Duane, as an escrow; and to be delivered to Jones on payment of the purchase-money. This fact appears, not only from the testimony of a subscribing witness to the deed; but from the petition of William Peters, as recited in the act of March, 1788; and it is conclusive proof that the sale was not intended to be absolute, until the purchase-money was paid. There is nothing in the case to warrant the idea that the sale was upon credit. It was, no doubt, the understanding of the parties that the deed was to be executed and the money paid within a reasonable time, or with all convenient speed; and that until the money was paid and the deed delivered, the sale was not to operate, and the title was to continue in Croghan. This is not only the obvious meaning of the transaction, but it is the conclusion of law. According to the decision in *Simonds v. Catlin*, 2 Caines, 61, a sheriff's sale of lands is within the statute of frauds, and requires a deed or note in writing to pass the estate. The deed in question was clearly an escrow. It was left with Duane to be delivered over to Jones, on payment of the purchase-money. This was a plain and specific condition to be performed before the deed could operate. A deed is delivered as an escrow, when the delivery is conditional, that is, when it is delivered to a third person, to keep until something be done by the grantee; and it is of no force until the condition be fulfilled. The condition may consist in the payment of money as well as in the performance of any other act: S. Touch. 55; 7 Viner, tit. faits. O. pl. 4. There is no weight in the observation made by the counsel, that the deed was not delivered to a stranger. Duane was attorney to Peters, the plaintiff in the execution, but he was still a stranger to Jones, the purchaser. There was no privity existing between them. If the deed did not pass the estate for want of delivery, the return upon the execution clearly did not. The case of *Simonds v. Catlin*, settled this point. The note, or memorandum in writing, must specify with sufficient certainty, the lands sold, and who was the purchaser; for it does not otherwise answer the intent of the statute. The return, in the case before us, has no manner of certainty. It states only that the sheriff had sold of the lands of the defendant to the amount of the demand. My opinion, then, is, that neither the sale, nor the deed, nor the return on the execution, passed the estate. We are next to see whether the condition has at any time since been performed, so as to confirm the sale, and give effect to the deed.

The petition of William Peters, to the legislature, in 1788, admitted that the purchase-money had not then been paid, and that the deed was still remaining in the hands of Duane. The title to the premises, of course, continued in Croghan, for the fee cannot be in abeyance, but must abide in some person. Not having passed to Jones, by the sale, for want of payment, it vested in Croghan. This leads me to consider, in the second place, the effect of the act of attainder, and of the sale by the surveyor-general.

The act of the twenty-second October, 1779, attainted, among others, Thomas Jones, of the offense of adhering to the enemies of this state. This was a specific offense, and was not declared or understood to amount to treason, because many of the persons attainted had never owed any allegiance to this state. The forfeitures arising from this attainder, must be sought for in the act, and nowhere else. By this act, Jones forfeited "all his estate, both real and personal, held or claimed by him, whether in possession, reversion or remainder, and also all estates and interests claimed by executory devise or contingent remainder." It is then to be examined, whether the state, by this act of attainder, acquired any right to perform the condition.

The expression, real estate, signifies such an interest as the tenant hath in land. It is the condition or circumstance in which the owner stands, with regard to his property: 1 Inst. 345, a; 2 Black. Com. 103. It implies, therefore, a right, interest, or ownership, existing in the soil. Here the statute defines the estate. It must be an interest in the land existing in possession, reversion, remainder, by executory devise, or contingent remainder. The condition in question was neither of these. No interest whatever in the premises had vested. Jones had nothing, not even a *scintilla juris* in the land which he could assign, so as to enable the assignee to perform the condition. A mere possibility is not the subject of a grant, unless it be a possibility coupled with an interest: Shep. Touch. 414, pl. 18, 238; Viner, tit. Possibility, B. tit. Grant, N. In *Marks v. Marks*, 10 Mod. 419; 1 Str. 129, it was admitted to be a maxim of law, that a stranger could not take advantage of a condition, for it was not assignable. An assignee must be privy in estate, and have an interest in the condition, or he cannot perform it: Litt. sec. 836; Co. Litt. 207 b. Such general words as those used in the act of attainder, have never been construed, in any period of the English law, as extending to a

condition. At common law, no condition, use or mere right of action, was forfeited to the king upon attainder of treason, notwithstanding such attainder reached the lands and tenements: 3 Just. 19; 1 Hale, 244, 247; 2 Hawk. 637. This restriction led to the statute of 33 H. 8, c. 20, which declared, that uses, entries and conditions, as well as possessions, reversions and remainders, should be forfeited upon every such attainder. And since that statute the only question has been, whether the condition was personal, and inseparable from the party attainted, or could be performed by the crown. The statute of 26 H. 8, c. 13, declaring the forfeiture in treasons, extended it to all estates of inheritance, in use or possession, in lands, tenements and hereditaments, by any right, title or means, etc. These words are certainly as broad as those used in our act of attainder; yet they were not considered as including a condition, or a mere right of action. It required the express words of the statute of 33 H. 8, to embrace those cases.

The decisions which have since been made in England, on the question of the forfeiture of conditions, are instructive examples of the strictness with which the courts have construed this right of forfeiture, since the statute of H. 8, and of the independent spirit displayed in the discussions on this subject, even under the enormous pressure of the prerogative of the Tudors and Stuarts. In the *Duke of Norfolk's case*, 11 Eliz., a personal condition was held not to be forfeited by attainder of treason; and in *Englefield's case*, 33 Eliz., 7 Co. 11, it was ruled that a condition, not being personal, might be performed by the queen, and yet it was not thought prudent to rely upon this judgment, and the statute of 35 Eliz. confirmed the forfeiture. The case of *Wardner v. Hardwin*, Latch, 107; Wm. Jones, 137, on the question whether the condition was forfeited, is said to have walked through all the courts in Westminster Hall, and the court of king's bench was at last equally divided. In *Smith v. Wheeler*, 1 Mod. 38; 1 Hale, H. P. C. 246, it was decided that the trust was personal, and not forfeited by attainder, notwithstanding the attainted person had the *jus disponendi*, and was, according to Sir Matthew Hale, "guilty of the execrable murder of the king."

In every view, therefore, of this question, whether we consider the technical force and meaning of the words used, or the rule that such a possibility is not assignable; whether we consider the principle of the common law, that a condition was not subject to forfeiture for treason, or the series of decisions since

the statute of H. 8, showing the strictness with which such forfeitures have been regarded, I am clearly of opinion that the attainder of Jones did not vest in the state any right to pay the purchase-money and take the land. The state was a stranger to the condition, and had no right to perform it.

Jones was to be considered as *civiliter mortuus* by the act of attainder; but whether his legal representatives were competent to perform the condition, it is unnecessary to inquire, because there is no evidence before us that any such performance was ever attempted. The heirs of Croghan have, therefore, an existing title to the premises, unless the sale by the surveyor-general was an alienation of their right. This sale was made under the act of the twenty-second of March, 1788, which, so far as related to this subject, was a private act, and liable to the rules of construction applicable to such statutes.

In England, a general saving clause is now always added, at the close of every private act, of the rights and interests of all persons, except those whose consent is obtained; and before this practice of inserting the saving clause, it was held that a private act did not bind strangers: 2 Black. Com. 345; 4 Cruise's Dig. 518, 519. In *Boswell's case*, 25 and 26 Eliz., cited in *Barrington's case*, 8 Co. 138 a, it was resolved in the court of wards that when an act of parliament maketh any conveyance good against the king, or other person certain, it should not take away the right of any other, although there be not any saving in the act. This just and liberal decision, and which is also warranted by the opinion of Sir Matthew Hale, 1 Vent. 176, is perfectly applicable to the present case. The act directs only the surveyor-general to sell the lands so purchased by Thomas Jones, and to execute a deed without a clause of warranty; but does not declare the operation of this deed as against the rights of Croghan and his heirs. In the language of *Barrington's case*, this act does not make that deed good as against any person certain, except it be the state, and therefore it shall not take away the right of any private person. It is a mere quitclaim of the right and interest which the state might have had in the premises, without declaring the extent or certainty of that right. If the act had declared the sale to be a bar to the claim of Croghan, a very serious question would have arisen on the validity of a statute taking away private property without the consent of the owner, and without any public object or any just compensation. But it is evident that no such operation was contemplated. The act passed, probably under a mis-

apprehension of the rights of the state, resulting from the attainder of Jones. The sale was directed upon the suggestion of Peters, for the purpose of passing the interest of the state, whatever it might be, *valeat quantum valere potest*. The title of Croghan is not so much as once mentioned in the act, and was undoubtedly intended to be left to its due weight and effect in the ordinary course of justice.

The court are, therefore, of opinion that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

LANSING v. GAINÉ.

[2 JOHNSON, 300.]

NOTE TAKES EFFECT FROM DELIVERY.—Notes delivered after the time on which they are dated are valid only from the day of delivery, and are to be considered as drawn on that day.

NOTICE OF DISSOLUTION OF PARTNERSHIP.—Notice of the dissolution of a partnership in a newspaper is sufficient notice to all persons having no previous dealings with the firm.

POWER OF PARTNER AFTER DISSOLUTION.—Where a partner, after dissolution, issues notes in the name of the firm, the other partner is not liable thereon, for the power to bind the firm ceases with the partnership.

SPECIAL PARTNERSHIP—POWER OF PARTNER.—When a partnership is formed for a special purpose, and is limited, and a partner gives the firm notes for his individual obligation, the other partner is not liable, if the notes are issued without his knowledge or consent, and the person receiving them is aware that they are not issued for a firm debt.

DEFENSES AGAINST OVERDUE NOTE.—Where a note is transferred after it has been dishonored, the holder takes it subject to all defenses against it in the hands of the original payee.

ACTION on two promissory notes. One note was dated August 1, 1804, for five thousand dollars, payable on demand to Hale, or order, for value received on account of the Literature Lottery; and the other dated October 9, 1804, for one thousand dollars, payable to Storm, or order, sixty days after date, value received of the lottery.

Ten Eyck, one of the defendants, suffered judgment to pass against him by default, and Gainé, the other defendant, pleaded *non-assumpsit*.

The following facts appeared: The defendants were partners as booksellers, and the partnership name had been signed to the notes by Ten Eyck, who managed the business, and was

accustomed to subscribe the notes issued by the firm. The defendants had been concerned in the purchase and sale of tickets in two former lotteries granted by the state; and tickets to those lotteries as well as to a third lottery, to which the notes referred, were publicly sold in defendant's bookstore. Ten Eyck and the clerks, who attended at the store, generally sold the tickets and mixed the money received therefrom with money obtained in the course of the partnership business, and in one or two instances money received from the sale of tickets in the two former lotteries was deposited in the bank to the partnership account. It did not appear that Gainé knew of this mingling of the money. Ten Eyck kept a separate account of the proceeds from the sale of the tickets in each of the three lotteries. Gainé had no interest whatever in the third lottery; Ten Eyck, Hale and Storm were the just managers of it, and to Hale and Storm the notes were given in part for money received by Ten Eyck from the sale of tickets in the third lottery.

The partnership of Gainé and Ten Eyck was dissolved by public advertisement, on the twenty-second October, 1804; and Storm's note was delivered to him November 3, 1804, after the failure of Ten Eyck, which became publicly known November 1, 1804, the day on which Hale's note was delivered. The notes being dishonored were indorsed to the plaintiff, the state treasurer, for the use of the state.

Storm testified that he received the notes as agent for the state on the credit of Gainé and Ten Eyck, supposing them equally liable.

Plaintiff's counsel offered in evidence what purported to be a release, dated twenty-second October, 1804, from Gainé to Ten Eyck, of all demands against him by reason of the partnership, in consideration of an assignment, of even date, from Ten Eyck to Gainé of all the former's interest in the copartnership property, and of all his personal property, Gainé engaging to pay "all the notes and bonds mentioned in a schedule annexed, and all other debts due from the copartnership, of whatsoever kind or nature not secured by notes, and to save harmless," etc. In the schedule was an item, "five thousand dollars, notes for lottery." This release was delivered as an escrow, to be delivered to Ten Eyck on the performing of certain conditions, one of which was never performed.

This evidence was objected to; but the judge admitted it, saying that though the release was not conclusive on the parties, its conditions not having been performed, yet it was evi-

dence as to the declarations of the parties in relation to the subject-matter, liable, however, to be explained by defendant.

Verdict for plaintiff. A motion for a new trial was made on the ground: 1. That the notes were not made on the partnership account, and were received by parties who knew they were given for Ten Eyck's separate debt; 2. That the notes being issued after partnership had been dissolved, they were void; 3. That evidence had been improperly admitted.

Woodworth, attorney-general, for the plaintiff.

Hoffman and Harison, for the defendant.

KENT, C. J. The notes upon which this suit is brought were delivered by Ten Eyck to the payees, some time after notice had been given in the newspapers of the dissolution of the partnership of Gainé & Ten Eyck. The date of the notes, then, becomes immaterial, as they were valid only from the time of their delivery; and, unless the contrary be shown, the presumption will be, that they were then actually drawn, and were antedated by mistake or design. If they had been previously drawn, they had no force while in the possession and under the control of the maker. To all legal purposes, the notes are to be considered as made or drawn when they were delivered. This was so ruled by Lord Kenyon, in the case of *Abel v. Sutton*, 3 Esp. Cases, 108, in which he held that, if a fair bill existed at the time of the partnership, and was not put into circulation until after the dissolution, all the partners must join in putting it into circulation, otherwise they were not holden. Notice in the newspapers of the dissolution of a partnership is sufficient notice to all persons who have had no previous dealings with the firm; and there is no evidence, in the present case, that the payees ever had any such previous dealings. This rule has received repeated sanction in the English courts: Peake's N. P. 42, 154; 1 Esp. Cases, 371; 3 Esp. 108, 248; and it is reasonable and just. Without the protection of such a rule, one partner never could retire with safety from the concerns of the partnership. Instead of being the means of enterprise and profit, a mercantile connection of this nature would prove a source of never-ceasing anxiety, and become oppressive and ruinous. The fact, then, that the notes were issued by Ten Eyck, after the partnership was dissolved, is sufficient to exempt Gainé from being bound by the notes, even if they had been given for a partnership concern. The power of one partner to bind the other ceases with the existence of the partner-

ship. This is a proposition clear and undeniable, and it places the defense set up by Gainé upon sure and tenable ground.

It would be as unjust as it is illegal to charge the defendant Gainé; for the notes were not only given subsequent to the dissolution of the partnership, but the evidence in the case shows that they were given for the private debt of Ten Eyck. The partnership of the defendants was a limited one. It was confined to the bookselling business. Ten Eyck was a manager in the lottery alluded to in the notes. This was a personal trust, and could not be carried into the partnership. Gainé had no interest or concern with him in the lottery. The payees were managers of the lottery with Ten Eyck, and, of course, were well acquainted with the relation in which he acted, and with the consideration for which the notes were given, which was for the lottery money received by Ten Eyck, upon the sale of tickets. Though the tickets were sold in the bookstore of the defendants, and the money arising from the sale of them was mingled with the copartnership moneys, yet a separate account was kept by Ten Eyck of the sale of the tickets, which was not in the partnership books. There was, then, no ground for an inference that a partnership existed in the sale of the tickets. The sale was made in pursuance of a trust, open and notorious, not of a copartnership nature, and in which the payees were personally connected. The proceeds of the sales formed a separate account, detached from the partnership books; and, notwithstanding that one of the payees said that he received his note on the credit of the firm, yet he had no authority to consider the firm as holden, and he drew that inference at his peril. The payees either knew, or were bound to know, from the facts in the case, that the notes were given by Ten Eyck on his own account, for a debt contracted by him in his character as manager. There was no room for mistake or imposition. The notes, upon the face of them, specified for what consideration they were given, and the payees were joint managers with Ten Eyck in the lottery in question. Most clearly, then, the notes were not given for a partnership debt, and it is equally clear that this was known to the payees. Here were then copartnership notes given by one partner for his private debt, after the partnership was dissolved, and when the payees knew that the notes were for his private debt, and knew also, or what amounts to the same thing, were chargeable with notice of the dissolution of the partnership. It would be difficult to make out a stronger case for the defendant Gainé, even upon principles of justice;

and I feel disposed to adopt and apply the rule laid down in *Livingston v. Hastie and Patrick*, 2 Caines, 249, that when one takes a partnership note from one of the company for what he knows to be his particular debt, and he takes it without the knowledge or consent of the other partner, it would be wrong to hold the other party bound, and unreasonable to allow a payee thus to extend his security.

If the notes, while in the hands of the payees, did not bind Gaines, they are equally inoperative in the hands of the plaintiff. They were negotiated to him after they had been dishonored, and he took them, subject to all the equity that existed against them in the hands of the original payees.

But a certain covenant of the defendant Gaines, with the schedule annexed, is supposed to give a different complexion to the case.

This deed and schedule were delivered as an escrow, i. e., conditionally, and as the condition was never complied with, the same became void. Whether those papers were still competent evidence against Gaines of the facts stated or admitted therein, is a point we need not stay to examine, because, supposing them admissible, the declaration, as to the notes in question, was too loose and equivocal, to charge Gaines with a contract, by which he was not before holden; and when we perceive that the admission contended for was against the real truth of the case. The admission ought at least to have been explicit that the notes were given on a partnership account, and that Ten Eyck had authority to draw and deliver them in behalf of the firm. But the admission contains no such thing. It merely says, at the head of a long list of notes, of which those before us form a part, "notes given on our account;" and this is said, too, not in the covenant executed by Gaines, but in a schedule referred to in that covenant, and signed by Ten Eyck alone. This is a very dangerous and unfit foundation on which to rest a demand against Gaines, for the debts of Ten Eyck. The nature and manner of the admission cannot but strike us with peculiar force. The paper was given upon the ground of compromise with a partner, who had abused his confidence; and upon certain terms, Gaines might not have had any objection to have the notes in question added to the list of notes given on the partnership account. If he were to assume the payment of them, he would, of course, be very careless as to the particular list to which they were added. A paper which was drawn originally upon the ground of accommodation, and which has

become void in law, ought, at least, to be read with caution, for we cannot determine how far the facts it contains may have been declared or assumed hypothetically. But taking the declaration in its full extent, that the notes were given "on our account," it is not sufficient, because the evidence in the case is decisive, that the notes were put in circulation by Ten Eyck, after the partnership was dissolved, and consequently after the authority of one partner to bind the other had ceased. Ten Eyck had no longer any authority to bind Gaine, even upon a partnership account. The case of *Abel and Sutton* is to this effect. It required something more than the admission that the notes were given upon a partnership account. He must have gone further, and admitted that Ten Eyck had new or fresh authority, to negotiate the notes in behalf of the firm.

I am, therefore, of opinion, that the verdict is against evidence, and that a new trial ought to be granted, upon payment of costs.

THOMPSON, J., declared himself of the same opinion.

SPENCER, J., not having heard the argument in the case, gave no opinion.

New trial granted.

EMANS v. TURNBULL.

[2 JOHNSON, 313.]

EASEMENT, EXTENT OF.—Where a grant was made with a reservation of a right of egress and regress, or of fishing and fowling upon the land, this did not give the right of taking wood, grass, or anything appurtenant to the ownership of the soil.

PRESUMPTION AS TO ANCIENT GRANT.—An agreement relative to lands, which had existed for more than one hundred years, providing that it should be owned and held by the parties in parcels, and which was evidently intended to convey a fee, and where there has been under it uninterrupted possession, will not be technically construed, and a regular grant will be presumed.

TITLE BY ESTOPPEL.—If one party agrees in writing with another that he shall own and hold a piece of land to him and his heirs, and delivers him possession, which possession is held and enjoyed beyond the memory of man, he is concluded from disputing the title.

OWNERSHIP OF ACCRETION TO LAND.—Sea-weed which has been thrown upon land by the sea is considered an accretion, and belongs to the owner of the soil.

TRESPASS for assaulting plaintiff and detaining him, and his horses and wagon. Pleas 1. The general issue; 2. *Son assault*

demesne; 8. That defendant, before and at the time of the trespass was possessed of a certain close in Gravesend, and of the sea-weed on the ground in the close; that the plaintiff, with force and arms entered the close, and would have carried away large quantities of sea-weed had not defendants and their servant gently laid hands upon the sea-weed to keep the same, and gently led plaintiff's horses and wagon out of the close. Replication and rejoinder.

There were produced at the trial patents and grants extending back many years, and an agreement made the twenty-ninth of April, 1670, by the inhabitants of Gravesend and one Brown, between whom disputes had arisen regarding the property in question and other lands, whereby it was agreed that the lands and limits lately in controversy should be held and owned to each party, their heirs, etc.; that Brown should have the neck of land, with the timber and herbage that lies from his house southward, bounded on one side by the bay to the west, and by a creek to the east, the creek to be the boundary between Brown and Gravesend; but that the inhabitants of Gravesend should have free egress and regress over the said neck of land, and along by the water side, or strand on the west, with the liberty of taking fish and fowling, or any other needful occasion, without any molestation from Brown, etc. There was in evidence a patent from the governor confirming the terms of the agreement. The defendant claimed under Brown.

From parol evidence it appeared that the neck was a sandy, uncultivated strip of ground, producing wild grass capable of sustaining cattle; that Turnbull and those under whom he claims, had exclusively pastured cattle there and had taken the wood; that the inhabitants of Gravesend had used the neck for passing and repassing, to fish, and for a public landing; that the sea-weed had not been considered of any value until after the war, when it was found to be good for manure; that the inhabitants of Gravesend, from time to time since, have taken away the sea-weed from the beach of the neck, though continually warned not to do so; that plaintiff, one of the inhabitants, had collected a quantity of sea-weed, and was about carrying it away, when he was prevented by defendants as complained of.

A verdict was found for the defendants, and plaintiff moved for a new trial.

Riggs and Benson, for the plaintiff, contended that the *locus in quo* being in the freeholders of Gravesend, the agreement of

1670 did not divest them of it. That agreement amounted to nothing more than a license to Brown to take the wood and herbage; the soil did not pass. Had there been a formal grant of the wood and herbage, the fee would still remain in the grantors: 4 Com. Dig. Grant, E. 5; Co. Litt. 4 b., note 19. The sea-weed vested in the inhabitants immediately upon being cast up by the sea, as well as by reason of prior occupancy; the inhabitants having been accustomed to carry it away: 1 Domat Civ. L. Lib. 3, tit. 7, sec. 2; 2 Bl. Com. 393. By virtue of the agreement, moreover, the inhabitants have right to the sea-weed; for the words "needful occasions" should be liberally construed in their favor.

Hoffman and Harison, contra, urged that the fee was vested in Brown by the agreement of 1670; that the words wood and herbage did not control the first part of the instrument; that the quiet possession for more than a hundred years ought to be conclusive in favor of the defendants. The sea-weed belongs to the owner of the soil, not the first occupant; it is an alluvion: Hargrave's Law Tracts, 28.

KENT, C. J. The first question arising upon this case is, who is seised in fee of the *locus in quo*? Does it reside in the inhabitants of Gravesend, or in Turnbull, the defendant? By the agreement of 1670, it was evidently intended to convey the fee of the neck to Brown. It is stated to be a final agreement or determination concerning certain parcels of land lately in controversy between the parties, and the order of Governor Lovelace, of the preceding year, stated that the title to the neck was one of the subjects of controversy. The agreement declares that the said parcels of land shall be owned and held by each party, as thereafter mentioned, and to their heirs, successors and assigns, as their proper right; and in the seventh and eighth articles, it is declared to be agreed that Brown should have all the neck of land, with the timber and herbage, and that the inhabitants of Gravesend should have free egress and regress over the same. The intention here is manifest to vest the fee in Brown, and to reserve a right of way to the inhabitants. Considering the antiquity of the instrument, and that the defendant, Turnbull, and those under whom he claims by a regular deduction of title from Brown for a period of time as remote as the memory of witnesses can reach, have exercised constant and exclusive ownership over the neck in question, the agreement ought at this day to be most liberally expounded, so

as to give effect to the intention. The agreement purports to be signed by sundry persons, and the inhabitants of Gravesend cannot be permitted to say that those were not persons competent to convey the neck; for afterwards, in the same year, 1670, they accepted from Governor Lovelace a confirmation of their patent, which patent of confirmation expressly allows and confirms the agreement. The inhabitants of Gravesend are, therefore, to be considered as regular parties to the agreement; and as it was accompanied by a delivery of possession, for so we are to intend, as the possession hath been uninterruptedly enjoyed and continued down, the people of Gravesend are concluded from disputing the title of the opposite party. Admitting the writing to be deficient in the apt terms requisite to pass a fee, the agreement ought to bind the inhabitants, especially after such a lapse of time, accompanied by so long an acquiescence. An arbitration bond and award cannot have the operation of conveying land; but a party, by his agreement in that way, has been held to conclude himself from disputing the title: *Doe v. Rosser*, 3 East, 15. This is going much further than the present case requires. We need only say that if one party agrees in writing with another that he shall own and hold a piece of land to him and his heirs, and he delivers him the possession, and that possession is held and enjoyed for a time beyond the memory of man, in such a case we will not search curiously for technical terms, but will hold the party to be concluded, by his agreement and subsequent acts, from disputing the title.

The next point in the case is, whether the sea-weed thrown by the sea upon the shore or beach of the neck did thereby vest in the owner of the soil, or belong to the first occupant. The plaintiff's right, if any, rested upon occupancy; for the liberty of egress and regress, and of fishing and fowling, reserved to the inhabitants of Gravesend by the agreement of 1670, gave them no other rights than those expressed. They could not take wood, grass, or anything appurtenant to the ownership of the soil. The plaintiff then had no right to the sea-weed, because he was an inhabitant of Gravesend. Any stranger would have had an equal right to take it.

The sea-weed thus thrown up by the sea may be considered as one of those marine increases arising by slow degrees; and according to the rule of the common law it belongs to the owner of the soil. The rule is, that if the marine increase be by small and almost imperceptible degrees, it goes to the owner

of the land; but if it be sudden and considerable, it belongs to the sovereign: 2 Bl. Com. 261; Harg. Law Tracts, 28. The sea-weed must be supposed to have accumulated gradually. The slow increase, and its usefulness as a manure, and as a protection to the bank, will, upon every just and equitable principle, vest the property of the weed in the owner of the land. It forms a reasonable compensation to him for the gradual encroachment of the sea, to which other parts of his estate may be exposed; this is one sound reason for vesting these maritime increments in the proprietor of the shore. The *jus alluvionis* ought, in this respect, to receive a liberal encouragement in favor of private right. I am of opinion, therefore, that the motion for a new trial ought to be denied.

THOMPSON, J., concurred.

SPENCER, J., not having heard the argument in the cause, gave no opinion.

Judgment for the defendants.

In 3 Washburne on Real Estate, 54, 55, 59, this case is cited, first showing a presumption as to a grant from long-continued possession, next showing title by accretion, the author saying: "Thus kelp and other marine plants, when detached from the bottom of the sea and thrown on the shore or beach, become vested in the owner of the soil. But, to become so, they must be cast upon the shore, and rest there so as to become attached to the soil." In *United States v. Arredondo*, 6 Peters, 740, it is cited as to the construction of a grant. In *Mather v. Chapman*, 40 Conn. 382, the court referred to the case, saying: "The sea-weed in this suit is not treated as part of the real estate which by small and imperceptible degrees had become part of the plaintiff's land. It is treated as personal property, and the defendant is sued for taking it as such and converting it to his own use. In the case of *Emans v. Turnbull*, the plaintiff's title was held good upon a liberal construction of the *jus alluvionis*, which implies that the weed had then become part and parcel of the plaintiff's land, and must therefore have been above, or upon, ordinary high-water mark."

SCOTT v. LIBBY.

[2 JOHNSON, 336.]

FREIGHT, WHEN EARNED.—A vessel was chartered from New York to St. Domingo and return, the charterer to pay an entire sum for the whole voyage, in sixty days after the return of the vessel to New York. Arrived in sight of St. Domingo, the vessel was turned away by a British cruiser, because of a blockade of that port; thereupon, she returned with her original cargo to New York, where the owners refused to deliver the cargo until freight was paid. In an action of trover to recover the value of the goods, it was held that no freight was due.

CHARTER PARTY, HOW DISSOLVED.—A blockade of the port of destination dissolves the charter party, and thus all claim for freight under it, must be given up. No *pro rata* freight can be recovered, unless the goods have been accepted at a place short of the port of destination.

TROVER. A verdict was taken for the plaintiff, subject to the opinion of the court, upon the following statement of facts:

In November, 1803, the plaintiff chartered from defendants' agents, the ship *Live Oak*, on board of which he shipped two hundred and sixteen doubloons, to recover the value of which the action was brought, and certain other articles. By the bill of lading, signed by the master, he was to deliver the doubloons, etc., to plaintiff's consignee at St. Domingo. By the charter party the outward cargo was to be delivered at the city of St. Domingo to the consignee, and the plaintiff was to pay for the freight of the outward and return cargoes, four thousand four hundred and forty-four dollars and forty-four cents in sixty days after the ship's return to New York. The vessel sailed on her voyage, and on the twenty-eighth December, she came in sight of St. Domingo, when she was boarded by the commander of a British ship of war, who forbade the master of the *Live Oak* to enter St. Domingo, as it was blockaded. She was, consequently, forced to return to New York, where she arrived January 29, 1804. Plaintiff obtained a permit to land the cargo, but defendants' agent refused to deliver the doubloons until the freight was paid according to the charter party.

Hoffman and Riggs, for the plaintiff, contended that there had been an actual conversion; that defendants had no lien on the cargo; that they should resort to the charter party in an action against plaintiff; that this was not a question as to freight, but a contract for the use of the ship for a specific voyage, without regard to the quantity of goods: *Paul v. Birch*, 2 Atk. 621; *Abbot*, 244; *Malyne's Lex Mercatoria*, 100; *Bright v. Cowper*, 1 Brownl. 21; *Abbot*, 263.

Wells, for the defendants, urged that plaintiff was indebted to them for the services performed, though he derived no benefit, *Luke v. Lyde*, Burr. 882; that a *pro rata* freight was due, *Lutridge v. Grey*, *Abbot*, 249; that plaintiff had no right to insist on relanding the goods already laden, without paying full freight: *Abbot*, 338; 2 Eq. Cas. Abr. 98.

THOMPSON, J. The claim to freight set up by the defendants cannot be sustained. It appears to be conceded by the counsel on both sides, that by the blockade of the port of discharge.

the charter party was dissolved, and all claim to freight under it gone: *Abbot*, 338. Nor is this a case for *pro rata* freight. Here was no acceptance of the cargo at an intermediate point. A variety of cases may occur where the owner of goods may make himself responsible for freight, by an acceptance of his goods, short of the port of destination. But this results from an implied contract, raised by the acceptance of the cargo, and a supposed benefit received by the owner, from a partial transportation of his goods. But when the cargo, as in the present case, is brought back to the port of lading, no such presumption can arise. No benefit has accrued to the owner, nor has he done any act, from which an implied contract to pay any freight can be raised. The case of the *Hiram*, decided by Sir William Scott, 3 Rob. Ad. 180, is an analogous case; and notwithstanding it is not to be received as an authority, it is entitled to very respectful consideration, as the decision of a learned and eminent jurist on the maritime law of England. In that case, after a part performance of the voyage, and a capture and recapture, the vessel was brought back to the port, or *quasi* port of her departure. And after a consideration of the foreign authorities, and the case of *Luke v. Lyde*, it was held that neither under the particular terms of the contract, nor upon general principles and practice, was any freight due.

I am, therefore, of opinion, that judgment ought to be rendered for the plaintiff.

KENT, C. J., was of the same opinion.

SPENCER, J., not having heard the argument, gave no opinion.

Judgment for the plaintiff.

BIRD v. CARITAT.

[2 JOHNSON, 342.]

RIGHT OF FOREIGN ASSIGNEE TO SUE.—A suit may be brought in this state, in the name of a foreign bankrupt, and not by his assignees, and he may be joined with the assignees of a copartner who is bankrupt in this country.

LAW OF FORUM, WHEN GOVERNS.—The mode of proceeding to recover the debts of a bankrupt, whether in his own name, or in that of his assignees, is governed by the law of the forum where the suit is instituted.

PLEA OF PAYMENT, WHEN BAD.—Where the defendant alleged in his plea, that on the statement of an account, he delivered certain negotiable notes to C. on account and in behalf of the plaintiffs, but did

not aver that C. was the agent of the plaintiffs, nor that the notes were accepted in full satisfaction and discharge of the debt, the plea was held bad.

ISSUING WRIT, COMMENCEMENT OF ACTION.—An allegation that prior to the suing out of the writ, the defendant settled and discharged the debt of the plaintiffs, is sufficient as to the time; for the suing out of the writ is considered as the commencement of the suit.

ASSUMPSIT. The action was brought by H. M. Bird, B. Savage, and the assignees in bankruptcy of Robert Bird; the declaration stating, that prior to the bankruptcy of Robert Bird, Savage and Bird were partners; that defendant was then indebted to them in twenty-five hundred dollars for money laid out and expended, in the like sum for money lent, in the like sum for money had and received, and in the like sum on an *insimul computassent*.

The defendant pleaded: 1. *Non assumpsit*; 2. That prior to the bankruptcy of Robert, and prior to the suing out of the writ in this suit, H. M. Bird and B. Savage became bankrupts in Great Britain, that a commission was sued out there against them, that they were declared bankrupts, and their property placed in the hands of assignees for the benefit of the creditors, and that such commission remains in full force; 3. That prior to the suing out of the commission against H. M. Bird and Savage, prior to the appointment of the assignees of Robert, and before the suing out the writ in this suit, an account was stated between Bird, Savage & Bird and defendant, when it was found that the latter was in arrear in the sum of six thousand eight hundred and sixty-nine dollars and twenty-five cents, for which sum he gave his promissory note payable to Riley, by whom it was indorsed, and that defendant delivered the note to Childs on behalf of Bird, Savage & Bird, and on account of the said six thousand eight hundred and sixty-nine dollars and twenty-five cents, which is due, etc.; 4. That as security for the payment of the note delivered to Childs, on behalf of Bird, Savage & Bird, defendant indorsed and delivered to Childs, on account of Bird, Savage & Bird and on account of said note, several negotiable notes, all of which are long since due, and defendant has received no notice of their non-payment.

To the second, third and fourth pleas demurrers were interposed.

Hoffman and Riggs, for the plaintiffs.

Harrison and Caines, for the defendant.

KENT, C. J. The demurrer to the second plea raises the question, whether the assignees under a commission of bankruptcy sued out in England, can maintain a suit at law here in their own names. This is more a question concerning form than substance, for there can be no doubt of the right of the assignees to collect the debts due to the bankrupt, either by a suit directly in their own names, or as trustees, using the name of the bankrupt. It is a principle of general practice among nations, to admit and give effect to the title of foreign assignees. This is done on the ground, that the conveyance under the bankrupt laws of the country where the owner is domiciled, is equivalent to a voluntary conveyance by the bankrupt; and that the general disposition of personal property by the owner in one country, will affect it everywhere, because, in respect to the owner's control over it, personal property has no locality. But the mode of recovering the debts of the bankrupt, will depend upon the forms of proceeding in the country, and in the forum in which the assignee institutes his suit. In the court of chancery, in England, the assignee files his bill in his own name, and states his title under the commission. This is also said to be the practice in Scotland, because there is nothing in the forms of the Scotch proceedings to bar the assignee from bringing a direct action against the debtors of the bankrupt: Kame's Equity, vol. 2, 364; *Chevalier v. Lynch*, Doug. 170. At common law, however, a *chose in action* is not assignable. It was not, therefore, in the power of the bankrupt to assign the promises stated in the declaration, so as to enable the assignee to sue upon them in his own name; yet his assignment would have transferred as valid a title as that under the foreign commission. No instance has been shown in which the English courts of law have allowed the foreign assignee to prosecute in his own name, and I presume, no such instance exists. The plea is, therefore, clearly bad. The suit was properly brought in the name of the English bankrupts, and there is nothing upon the record by which the court can infer, that the suit is not carried on at the instance of the assignees, and for their benefit as trustees.

The third and fourth pleas do not correspond with the precedent in *Kearslake v. Morgan*, 5 T. R. 513. In that case, the plea averred that the negotiable note of a third person had been accepted and received by the plaintiffs in full satisfaction and discharge of the prior *assumpsit*. Here the notes are stated to have been delivered to one Francis Childs, for, and on be-

half of the plaintiffs; and *non-constat* that Childs was an agent of the plaintiffs for that purpose, or that the notes ever came to the knowledge or into possession of the plaintiffs. Childs was to them a stranger, and they were not bound to look after him. These pleas are, therefore, bad in substance, and it would be unnecessary to notice the special causes of demurrer, were it not that the defendant, according to his suggestion upon the argument, may apply for leave to amend them.

As to the objections, then, to the pleas in point of form, I would observe that the averment of a settlement and discharge, prior to the suing out of the writ, was sufficient, because the time of the suing out the writ is the commencement of the suit for the purpose averred in the plea. It was considered as the commencement of the suit in the case of *Carpenter v. Butterfield*, July term, 1801, and again in *Lowry v. Lawrence*, 1 Caines, 69, and this is the good sense as well as the truth on the subject. The matters contained in these pleas, if amounting to a satisfaction and discharge, or payment, might be pleaded as well as given in evidence under the general issue. The case of *Kearslake v. Morgan*, 5 T. R. 513, is decisive that they might be specially pleaded.

THOMPSON, J., declared himself of the same opinion.

SPENCER, J., not having heard the argument, gave no opinion.

Judgment for the plaintiffs.

See where the authority of this case is recognized: *Raymond v. Johnson*, 11 Johns. 490; *Fowler v. Sharp*, 15 Id. 326; *Anderson v. Highland T. Co.*, 16 Id. 88; *Bronson v. Earl*, 17 Id. 65; *Holmes v. Remsen*, 20 Id. 259; where the whole subject of a foreign assignee's right to sue is ably considered: *Hogan v. Cuyler*, 8 Cow. 205; *Retan v. Drew*, 19 Wend. 305; *Willink v. Piermoni*, 23 Id. 65; *Hoyt v. Thompson*, 5 N. Y. 341; *Beeler v. Turnpike Co.*, 14 Pa. St. 166; *Taylor v. Carpenter*, 2 Wood. & M. 16; *Perry Mfg. Co. v. Brown*, Id. 464; *Sims v. Ross*, 16 Miss. 560; *Fisk v. Brackett*, 32 Vt. 802; see *Riley v. Riley*, *ante*, 260.

Story, Conf. of Laws, sec. 565, referring to this case, says: "In America, contradictory decisions have been made upon the same point (assignee's right to sue), some courts affirming, and others denying, the right of the assignee to sue in his own name, although the weight of authority must now be admitted to be against the right." An examination of the cases cited by the distinguished author shows that the cases most decidedly are against the right.

CHERLOT v. BARKER.

[2 JOHNSON, 346.]

INSURABLE INTEREST.—A vessel was chartered for a voyage from New York to Jeremie and return, the charterer paying sixteen hundred and fifty dollars within sixty days after arrival at Jeremie, and eight hundred dollars on the delivery of the return cargo. The charterer insured freight for eighteen hundred dollars, being “two-thirds the value of the freight,” on a voyage “from Jeremie to New York, upon the freight of goods laden or to be laden,” etc. The vessel having been captured on her return voyage, and condemned, it was held that the charterer had not an insurable interest; for the policy being on freight generally, it could not be considered as on freight earned.

POLICY WHEN EXPLICIT MUST CONTROL.—Where the terms of a policy are clear and explicit, the court will not hear any suggestion or proof of mistake, as that an insurance on freight generally was intended to cover freight earned.

ACTION on a policy of insurance on freight. The policy was dated February 25, 1804, and the voyage was described from Jeremie to New York, upon the freights of goods laden or to be laden on board the schooner Mars. The freight was valued at one thousand eight hundred dollars, being two-thirds of the value of the entire freight. The charter-party was dated the thirteenth December, 1803, by which the vessel was chartered to the plaintiff, on a voyage from New York to Jeremie, and from thence back, for two thousand four hundred dollars, one thousand six hundred and fifty dollars to be paid within sixty days after notice of the arrival at Jeremie, and eight hundred dollars on the delivery of the return cargo. The outward freight was duly paid by plaintiff. At the time the policy was executed, defendant knew plaintiff was the charterer, and defendant had been, or was to be, the agent of the owner of the vessel. The Mars was captured on her return voyage and condemned, by which there was a total loss of vessel and cargo. The owners of the vessel had insured their freight, and recovered from the insurer eight hundred dollars, the amount of the homeward freight.

Verdict for plaintiff for total loss, subject to the opinion of this court.

Hoffman and J. Radcliff, for the plaintiff, contended that he had an insurable interest, if not an absolute, at least a qualified interest, which might be insured: Park, 11; Marshall, 218; that where a right to freight has commenced by an inception of the voyage, the insured may recover for the loss of freight: Mar-

shall, 76. In *Lawrence v. Sebor*, 2 Caines, 204, the court looked to the intention to see what interest was to be insured.

Harison and Boyd, for the defendant, urged that the owner of goods, who stipulated to pay freight, has no interest in the vessel or freight as such; that, as there had been no risk run, plaintiff could not recover on the policy, but was entitled to a return of the premium.

THOMPSON, J. The policy declares the insurance to be upon the freight of goods, laden on board the schooner *Mars*, on a voyage from *Jeremie* to New York. This is a plain contract, without any ambiguity; and the only question is, whether the plaintiff has shown an interest in the subject insured. Though the policy may not be adapted to the real truth of the case, we must confine ourselves to it in determining what is the subject insured. It is a good general rule to require this to be clearly and plainly expressed upon the face of the policy, so that the underwriter may be apprised of what he insures. It is extremely easy for the assured to specify his particular interest, and it would be unreasonable to allow him to avail himself, under a general expression, of a concealed particular interest, contrary to custom and usage. Hence, it has been decided in the English courts: 3 Burr. 1401, and the same principle is recognized in this court, that a *respondentia* and bottomry interest cannot be covered by a general insurance on goods: *Robertson v. United Insurance Company*, January term, 1801 (1 Am. Dec. 166, and see *Kenny v. Clarkson*, ante, 336). Considering this an insurance on freight, the plaintiff had no interest in it. He was not owner of the vessel, but had hired her for the voyage, and had agreed to pay a certain sum for the freight, on the delivery of the cargo. The plaintiff was owner of the cargo, and the charter-party was a mere covenant to carry the goods. The plaintiff, instead of receiving the freight, was to pay it on the delivery of the cargo. As the cargo was not delivered, owing to the perils, no freight was ever due from him, and, of course, he has sustained no loss. This must be considered a general insurance on freight, and not a particular insurance on freight earned.

It was suggested that there was some mistake in describing the interest intended to be insured; but we cannot listen to any such suggestions. The contract is, of itself, clear and explicit; and if any mistake has been made, it is not to be corrected here.

No risk having been run, the plaintiff is entitled to a return of premium. He must, accordingly, have judgment for the amount of the premium, with interest from the time of demanding it.

KENT, C. J., was of the same opinion.

SPENCER, J., not having heard the argument, gave no opinion.

Judgment for the plaintiff for the premium, with interest.

CORTELYOU v. VAN BRUNDT.

[2 JOHNSON, 357.]

RIGHT OF FISHING—LIMITATION OF.—A right of fishing in any water gives no right over the adjoining land, nor any right to erect huts on the shore for that purpose.

PRESCRIPTIVE RIGHT.—A right to erect a building on another's land can in no case be acquired by prescription, which applies only to incorporeal hereditaments.

EVIDENCE OF USAGE INADMISSIBLE.—Evidence of a usage is inadmissible to explain the language of a deed not ambiguous or equivocal.

SAME.—Where, in an action of trespass, the defendant pleaded the general issue, and gave notice that he would offer in evidence a prescriptive right of fishing in the sea adjoining the *locus in quo*, and of using and occupying the shore for that purpose, he cannot give evidence of any prescriptive right to erect huts on the shore for the purpose of fishing, but such a custom should be pleaded or mentioned in the notice.

HIGHWAY, TITLE IN.—The grant or laying out of a highway gives only a right of way to the public; but the fee or right of soil remains in the owner, and an action of trespass will lie for any exclusive appropriation of the soil.

TRESPASS *quare clausum fregit*, for erecting a hut on plaintiff's close. Not guilty pleaded, with notice that defendant would offer in evidence that the inhabitants of New Utrecht had, from time immemorial, used the bay adjoining the close for the purpose of fishing, and had occupied the shore for convenience in doing so; that defendant was one of the inhabitants of New Utrecht, and had, on the day mentioned in the declaration, it being a proper season for fishing, entered the close, and erected a temporary hut for convenience in fishing. And further, that defendant would give in evidence two patents to the inhabitants of New Utrecht, the one dated August 15, 1668, the other May 13, 1686. And further, that the citizens of this state had, from time immemorial, used, at all proper seasons, the right of fishing in the bay, and of entering and occupying the shore ad-

joining the same, for the purpose and convenience of fishing in the bay, and that the defendant is one of such citizens. And further, that the close is a public highway or landing-place, and that defendant had a right to enter and use it for the purposes of fishing.

Plaintiff derived title from Jacques Cortelyou, to whom a patent had been granted February 23, 1671, for the premises "stretching along the bay," and claimed that the *locus in quo* was a part of these premises. It was admitted that if the patent extended on the S. W. or bay side to ordinary high-water mark, then the hut was erected within its limits, and the judge directed the jury that the ordinary high-water mark was to be considered as the S. W. boundary of the patent.

The evidence as to the use of the bay adjoining the close, and the shore thereof, for the purpose of fishing, was rejected. Defendant, to prove the *locus in quo* a public highway, offered in evidence an ancient record, in which there was an entry of a common highway along the S. W. side of the meadow of Cortelyou, over the beach: together with a memorandum reserving a space six feet in breadth for a common landing-place to be and continue forever, within which space defendant claimed that the hut was erected.

Plaintiff then proved that the *locus in quo* was above the present usual high-water mark; that land had been gradually washed away from the south-west boundary; that no use, within the memory of witnesses, had been made of the place where the trespass was committed, for the purpose of a landing-place; and that plaintiff had a house, for about twenty-five years, nearly adjacent to the spot where the hut was erected.

Verdict for plaintiff for six cents damages.

Baldwin, on behalf of the defendant, moved for a new trial, on the ground that evidence was improperly rejected; misdirection of the judge, as the rule of the civil law should have been adopted, that the highest point to which the spring tide rises is the boundary of the patent: Just. Inst., lib. 2, tit. 1, cap. 3; that the *locus in quo* was a public highway, and could not be lost by non-user; that the erection of the hut might be a nuisance, but could not be a trespass; that the erection of huts and drawing seines to the shore were inseparable to the right of fishing.

Hoffman and Harison, contra. Defendant could give no evidence of a prescriptive right to erect huts, as no notice of an

intention to do so was given under the plea. The right of fishing gives no right to occupy the shore: Saville, 11, sec. 19. The right of erecting a hut, being an exclusive appropriation, can only be established by grant. In laying out a public way, the right of soil remains in the original owner.

THOMPSON, J. The case states that the erection of the hut was the only trespass attempted to be proved. The first question is, whether the matters of fact contained in the first and third branches of the notice, annexed to the plea, were relevant to the defense, and ought to have been admitted in evidence. These facts went only to support a custom in the inhabitants of New Utrecht, and in the citizens of this state to fish in the bay adjoining the close, and to use and occupy the shore for that purpose. I think this evidence was properly excluded, because, if admitted, the facts did not amount to a justification of the trespass in erecting the hut. A right to fish in any water gives no power over the land: *Ipswich v. Brown*, Saville, 11; 3 T. R. 256. Nor will prescription, in any case, give a right to erect a building on another's land. This is a mark of title and of exclusive enjoyment, and it cannot be acquired by prescription. Title to land requires the higher evidence of corporeal seisin and inheritance. Prescription applies only to incorporeal hereditaments, and whether the right claimed be considered as strictly a custom, or prescription, the principle is the same; the only material distinction between them is that one is local and the other personal in its nature: Coke Litt. 113 b; 2 Bl. Com. 263, 264.

The patent under which the plaintiff claims, is described as stretching along the bay, and the rule of the common law carries it down to ordinary high-water mark. This is the settled rule, as appears from Lord Hale's *Treatise de jure maris*; Hargrave's *Law Tracts*, 12. The doctrine of the civil law is, therefore, not our rule, and the direction to the jury in this respect was correct. The patents introduced by the defendant gave no right of fishing, except what was comprehended within the bounds of those patents. There cannot be any real pretense for an authority under them, to encroach on adjoining patents. The usage offered to be proved, was inadmissible as a rule for the construction of those patents, because, when the language of a deed admits of but one construction, and is clear and pertinent, it cannot be controlled by any different exposition to be derived from the practice under it. The defendant must derive the right he sets up, either from the patent itself or from usage;

and if from the latter, it must be specially pleaded, or stated as a ground of defense in the notice. The defense, in both these respects, totally failed, as the patents contained no color for the right, and the usage to erect huts was not one of the matters of defense expressed in the notice which had been given.

The question as to the *locus in quo* being a public highway, was a matter of fact depending on proof offered on each side, and the jury must have had it fairly submitted to them. Their verdict is against the existence of the highway, and it appears to me to be agreeable to the weight of evidence. Even admitting the existence of the highway, the general rule here is, that the fee of a highway belongs to the owner of the adjoining ground, and that the sovereign has only a right of passage. It is but a servitude or easement, and trespass will lie for any exclusive appropriation of the soil: 1 Burr. 143; 2 Stra. 1004; 1 Wils. 107; 6 East, 154.

In every view, therefore, of this case, I am of opinion that the motion for a new trial ought to be denied.

KENT, C. J., was of the same opinion.

SPENCER, J., not having heard the argument, gave no opinion.

Rule refused.

WHIPPLE v. FOOT.

[2 JOHNSON, 418.]

CORN GROWING CONSIDERED A CHATTEL.—Wheat or corn growing is considered a chattel, and as such may be taken in execution.

LEVY ON GROWING CROPS.—To make a valid levy of an execution on growing crops, it is not necessary that a manual possession should be taken, and it is sufficient merely to declare that the subject is levied on under the execution.

TROVER for a quantity of wheat in the sheaf. The facts were: On August 16, 1806, a *feri facias* issued against R. Hatch, directed to the sheriff of Madison county, the plaintiff in this suit. On the same day, Whipple went to Hatch's house, to levy on all his property; but did not go into the field where the wheat was until the eighteenth of August, at which time he made a formal levy on the wheat, and took an account of it. He found, however, one W. Hatch in the field, with a number of men, engaged in cutting and removing the wheat, and was informed that they acted by the directions of Foot, the sheriff of Chenango county; and, notwithstanding the plaintiff's re-

monstrances, defendant took the wheat and sold it at auction. It appeared that a judgment had been recovered against R. Hatch, in December, 1805, upon which, on the nineteenth of December, an execution issued to Foot, the sheriff of Chenango county, which at that time comprised what is now Madison county. Foot went, in December, 1805, to Hatch's house, and levied upon all his personal property, particularly mentioning the wheat, then in the ground.

R. Hatch held the land by virtue of a parol agreement with Smith, in December, 1803, whereby it was agreed that Hatch should have the use of the land until he was paid for clearing it.

Kirkland, for the plaintiff. Wheat growing is not personal property, until severed from the ground: 1 Salk. 368; 4 Comy. Dig. Execution, 120, 121. Defendant's execution was made returnable in February, 1806, and he had no right to take the wheat in August, 1806. The wheat taken under the first levy has been suffered to remain in the debtor's hand, and that execution is, therefore, fraudulent: Wilson, 44; 7 Mod. 37, 38; 1 Ld. Raym. 251; 2 T. R. 596.

Gold, contra. Growing crops are considered personal property: *Cox v. Godsalve*, 6 East, 604, in note. The delay in the removal of the wheat is explained by the nature and situation of the thing.

By Court, THOMPSON, J. If the execution under which the defendant justifies the seizure and sale of the wheat growing on the ground, be deemed sufficient, it is unnecessary to determine the effect of the bill of sale, which forms a distinct branch of the defense. The defendant, soon after receiving the execution, and between the teste and return of it, went to the house of Hatch, the debtor, and levied on his personal property, and particularly mentioned the wheat in the ground. This was in December. In the ensuing August, when the wheat was ripe for harvest, the defendant, by virtue of the execution, and with all due diligence, caused the wheat to be cut, carried away and sold. The fee on the land on which the wheat was sowed, belonged to one Smith, and Hatch had the use of it so long only as would be sufficient to pay him for clearing. Under these circumstances I see no valid objections against considering this property as held by this execution. The wheat growing on the ground was a chattel, and as such, subject to be taken in execution: 1 Salk. 368; 1 Bos. & Pul. 397; 6 East, 604, note; Rob. on Frauds, 126. The defendant,

when he levied, took all the possession which the subject-matter would permit, and it was sold as soon as it was fit to be repeated. This, therefore, could not be considered as a dormant execution, and coming within the operation of the rule, that if a creditor seize the goods of his debtor on execution, and suffers them to remain in his hands, the execution is deemed to be fraudulent, and void against a subsequent execution: *Prec. in Cha.* 286; *1 Vernon*, 245; *7 Mod.* 37; *2 T. R.* 596. The reason of this rule is stated to be that in such case there is no change of possession, and so no alteration of the property. But in the case before us, the sheriff took all the possession of which the chattel was susceptible. The nature of the property accounts for the delay, and destroys the presumption of fraud that might otherwise exist. The sheriff might perhaps have sold the wheat while growing, and the purchaser would then have been entitled to enter for the purpose of cutting and carrying it away. But such a sale would probably have been very unfavorable, as the certainty and value of the crop could not be ascertained: *Owen*, 70; *Vent.* 222. The mere delay in such a case to sell until the crop should be fit for harvest, will not, of itself, amount to a fraud in law, and this is the only ground on which the judgment and execution under which the defendant justifies has been impeached. The justification having been made out, the defendant would be entitled to judgment; but by the provision in the case, we can only direct a judgment of nonsuit to be entered.

Judgment of nonsuit.

HARRISON v. CLOSE.

[2 JOHNSON, 448.]

COVENANT NOT TO SUE ONE OF TWO OBLIGORS.—Where there are two obligors or promisors, a covenant not to sue one, has not the effect of releasing the demand, nor will it protect the other from suit.

PAYMENT OF LESS SUM NO ACCORD.—The payment of a less sum, though accepted in full, where there is a certain amount due, cannot be taken as a good accord and satisfaction.

ASSUMPSIT on a promissory note, dated May 3, 1804, by which defendants promised, jointly and severally, to pay, six months after date, to O. S., or bearer, seventy-one dollars, with interest. Defendants pleaded *non-assumpsit*, with notice that they would prove at the trial that they paid and satisfied the note to O. S., the bearer, October 4, 1805, and further that they paid to O. S.

before the suit, twenty-one dollars and fifty-five cents in full satisfaction and discharge of the note, which sum was accepted as such satisfaction and discharge; and, also, that they paid twenty-one dollars and fifty-five cents to plaintiff, who accepted the same in full satisfaction of the note.

The cause was tried before KENT, C. J. At the trial the note was produced on which was the indorsement: "Received on this note, October 4, A. D. 1805, twenty dollars and fifty-five cents;" and it was proved that Close gave Wilcox, the co-defendant, who was only surety for Close in the note, twenty-one dollars and fifty-five cents, which Wilcox paid to plaintiff, who declared, at the time, that if Wilcox would pay him that sum, he would not call on him for the payment of the note, but would collect the residue of Close. On this evidence the plaintiff was nonsuited.

A motion was now made to set aside this nonsuit.

E. Williams, for the plaintiff.

Rudd, for the defendant.

By Court, SPENCER, J. An agreement never to sue a sole debtor, made on a valid consideration, or a covenant not to sue, has been justly held to operate as a release, to avoid circuitry of action; not that such agreement or covenant is in fact a release, but that it may be pleaded in bar, as between those parties, and it operates *quasi* a release. The case of *Cuyler v. Cuyler*, 2 Johnson, 186, was decided on this principle. But where there are two obligors, or promisors, a covenant not to sue one of them, so far from releasing the demand, has been repeatedly held not to protect the other obligor, and that then its operation is as a covenant: 2 Salk. 575; 8 T. R. 168; 2 Saund. 48, note No. 1. But in this case, the matters given notice of, with the plea, do not embrace the case of *Wilcox*, the defendant. The notice sets up the agreement not to call on him for payment, but to look to Close for the residue, as a full satisfaction and discharge of the note. Now, clearly, the agreement between the plaintiff and Wilcox, is wholly different. An accord and satisfaction operates as a final bar to the demand. The proof here, if proper notice had been given, would not have barred the plaintiff's remedy against Close; a very distinct case, therefore, is made out by the evidence, from the one set up in the notice. The case of *Fitch v. Sutton*, 5 East, 232, and the authorities there cited, go to show that the payment of the twenty-one dollars and fifty-five cents in this case, without a

release by deed, is no bar to the demand, and that the promise to look only to Close, is a *nudum pactum*. We are clearly of opinion, that the nonsuit must be set aside. The costs are to abide the event of the suit.

Rule granted.

MARKLE v. HATFIELD.

[2 JOHNSON, 455.]

FORGED BANK-BILLS NO PAYMENT.—The vendor sold and delivered cattle, and received payment in bank-notes, which he afterwards paid away to a third party, who discovered one of the notes to be forged. Neither the vendor nor vendee knew that the note was bad. In an action brought by the vendor against the vendee, on the original contract, for cattle sold and delivered, it was held that a forged note or bill which proves worthless is no payment, and that the party may treat it as a nullity, and resort to the original contract.

ERROR from the court of common pleas. Hatfield brought an action of *assumpsit* against Markle, the declaration containing counts for cattle sold and delivered; for money paid, etc.; for money had and received, etc.; and an *insimul computassent*. Plea, *non-assumpsit*. It appeared that Hatfield sold to defendant, a butcher, a number of cattle for one hundred and twenty dollars, and received in payment therefor several bank-bills; that plaintiff paid one of the fifty-dollar bills to a third person, who soon afterwards discovered it to be counterfeit, and returned it to plaintiff. The bill was produced at the trial, and proved to be counterfeit. No evidence was given that defendant knew the bill was counterfeit, and he was proved to be an illiterate man.

The judge charged the jury that plaintiff was entitled to recover the fifty dollars, with interest, although there was no evidence of fraud in the defendant. The jury found accordingly. To this opinion and charge the bill of exceptions was taken.

Ruggles, for the plaintiff in error. This may be considered an exchange of cattle for bank-notes, which are to be regarded as transferable by delivery like other goods or property, and unless there is an express warranty, the doctrine of *caveat emptor* will apply: *Seixas v. Woods*, 2 Cai. 48 (2 Am. Dec. 215); 2 East, 814; Doug. 18, 20; Id. 654; 2 East, 448. He who has accepted and paid a bill under the belief that it was genuine, cannot recover back the money upon discovering the forgery: *Price v. Neal*, 3 Burr. 1354. Nor can the purchaser of a forged bill recover the value thereof from the innocent vendor who did not

indorse the same: *Fenn v. Harrison*, 1 Ld. Raym. 442; 3 T. R. 759. Counterfeit money, if accepted, amounts to payment: *Wade's case*, 5 Co. 115; Co. Litt. 208; Shep. Touch. 140; 6 Bac. Ab. 450, tit. Tender, B.

J. Tallmadge, for the defendant in error. The doctrine of *caveat emptor* applies only where the vendee has an opportunity of examining and ascertaining the truth; here the party had no means of detecting the forgery. If a bill or note, payable in the future, proves of no value, the person to whom it was given in payment may consider it as waste paper, and resort to his original demand: *Stedman v. Gooch*, 1 Esp. Cas. 8, 5; *Pukford v. Maxwell*, 6 T. R. 53. Unless the party takes the bill or note as payment, and agrees to run the risk of their being paid, the mere taking does not amount to payment: *Owenson v. Morse*, 7 T. R. 64.

By Court, KENT, C. J. The justice of this case is clearly with the defendant in error. He parted with his goods to the plaintiff, without receiving the compensation which was intended. It would be matter of regret, if the law obliged us to regard a payment in counterfeit, instead of genuine, bank-bills, as a valid payment of a debt, merely because the creditor did not perceive and detect the false bills at the time of payment. The reasonable doctrine, and one which undoubtedly agrees with the common sense of mankind, is laid down by Paulus in the Digest; and has been incorporated into the French law. He says, that if a creditor receive by mistake anything in payment, different from what was due, and upon the supposition that it was the thing actually due, as if he receive brass instead of gold, the debtor is not discharged, and the creditor, upon offering to return that which he received, may demand that which is due by the contract. *Si quum aurum tibi promississem, tibi ignorantiqueas aurum aes solverim, non liberabor*: Dig. 46, 3, 50; *Pothier, Traité des Obligations*, No. 495.

But there are some ancient dicta in the English law, which advance a contrary doctrine in respect to gold and silver coin. It is said that the creditor must at his peril count and examine the money at the time he receives it. Bank-bills are not money, in the strictly legal and technical sense of the term; but as they circulate, and are received as money in the ordinary transactions of business, it becomes material to examine into the authority and solidity of these positions in the books. In *Shepherd's Touchstone*, p. 140, it is laid down, and with a refer-

size to the *Terms de Ley*, that if payment be made partly with counterfeit coin, and the party accept it and put it up, it is a good payment. Shepherd's Touchstone is supposed to be the work of Mr. Justice Doderidge, and as such, it has always been considered as a book of authority; but it loses some of its character for accuracy, when we consider it as a posthumous and surreptitious publication. The book to which it refers, gives no increased weight to the dictum. The same doctrine is contained in *Wade's case*, 5 Co. 114, but it is supported only on the authority of the case of *Vane v. Studley*, which is there cited, in which it is said to have been adjudged, that where the lessor demanded rent of his lessee, according to the condition of re-entry, and the lessee paid the rent to the lessor, who received it and put it into his purse, and afterwards discovering a counterfeit piece among the money, he refused to carry it away, and re-entered for the condition broken, the re-entry was held not to be lawful, because he accepted the money at his peril. This case of *Vane v. Studley* is cited cautiously, and stated as said to have been so adjudged. With regard to *Wade's case* itself, it did not require the aid of any such decision, because no such question arose in that case, and it was adopted by Lord Coke merely in illustration of his opinion. Perhaps, the question arising upon the forfeiture of a condition, might have induced the judges the more readily to adopt the rule, though in Shepherd the rule is laid down as general, and without any special application. These loose dicta, and this doubtful case of *Vane v. Studley* are, then, as far as I have been able to discover, all the authority which we have for this ancient doctrine; and it is to be remarked, that we find no subsequent sanction of it through all the accumulated decisions in the English law. On the contrary, the modern decisions are founded on different principles. They apply another and juster rule to cases of payment in negotiable paper. These cases are so very analogous to the one before us, that it would be very difficult to raise a distinction.

In *Stedman v. Gooch*, 1 Esp. Cases, 3, the plaintiff took in payment, for goods sold to the defendant, three promissory notes of one Finlay, payable at the house of one Brown, and gave the defendant a receipt to that effect. It appeared that Finlay had no effects in the hands of Brown, and the plaintiff sued upon the original demand, before the notes were payable. Lord Kenyon held, and his opinion was afterwards concurred in by the other judges of the king's bench, that if such a bill

or note was of no value, the creditor might consider it as waste paper, and resort to his original demand. If the plaintiff in that case was not bound by the acceptance of the promissory note of Finlay, because it proved afterwards to be of no value, why should the defendant in the present case be bound by the acceptance of a pretended promissory note from the Boston Branch Bank, when the note proves, afterwards, to be counterfeit? Whether it be the promissory note of an individual, or of a corporation, can make no difference. The creditor, in both cases, is presumed to have been ignorant of the want of value in the note. He cannot be chargeable with negligence, in not detecting, in the first instance, the want of value, because the means of ascertaining whether the note was or was not of value, may be, and probably were, equally in both cases, absent from the party. The like doctrine was advanced in the case of *Owenson v. Morse*, 7 T. R. 64, and it has been adapted and applied to a similar transaction of payment, in a negotiable note, in the case of *Roget v. Merritt and Clapp*, decided in this court: 2 Caines, 117.

The negotiable note of a third person, and a bank note, are equally promissory notes, for the payment of money; and if the receiver may be presumed in the one case, and not in the other, to have taken upon him the risk of the solvency of the drawer, there is no presumption in either case that he assumes upon himself the risk of forgery. In the case of the goldsmiths' notes, which formerly were accounted as ready cash, Lord Chief Justice Holt did, indeed, once say, *Tassel v. Lewis*, 1 Lord Raym. 743, that the receiver gave credit to the goldsmith, and took them at his peril; but this doctrine has since been exploded by repeated decisions: Str. 415, 508, 1248. Even were we to admit (which I do not) that there might be some difficulty in surmounting the opinion of Lord Coke, as to gold and silver coins: yet, as to bank bills and other promissory notes, we must conclude, upon the strength of authority, as well as upon the reason and justice of the case, that the charge of the court below was correct, and that the judgment ought to be affirmed.

I have not thought it requisite to pay much attention to the case of *Price v. Neal*, 3 Burr. 1354, which was cited in the argument, because I consider that case as decided upon principles which have no application to the case before us. It was there held to be incumbent upon the acceptor of a forged bill of exchange to satisfy himself of the genuineness of the drawer's hand, before he accepts and pays it, as he must be presumed to

know his correspondent's hand; and that it was not incumbent upon the defendant to inquire into that fact. That decision, therefore, turned upon the negligence imputable to the one party, and not to the other. No such imputation arises in the present case. The acceptance of a bill, and the indorsement of a note, give a credit to the paper, which, upon commercial principles, the party is not afterwards at liberty to recall.

Judgment affirmed.

BAYARD v. MALCOLM.

[2 JOHNSON, 550.]

PLEADING FRAUD AND DECEIT.—In an action on the case for deceit in the sale of a newspaper establishment, it was alleged that the defendants affirmed the number of subscribers to be nine hundred, and the profits to be three thousand dollars per annum, whereas, in fact, the number of subscribers was only six hundred, and the profits nothing, the declaration then concluded: "and so the said S. B. saith that he, by reason of the said affirmation of the said R. M. and S. M., was falsely and fraudulently deceived, to wit, the day and year aforesaid, at the city and county aforesaid. Wherefore, he saith he is made worse, and hath damage to the value of," etc. This was held to be a sufficient allegation that the defendants made the affirmations falsely and fraudulently, especially after verdict.

ACTION on the case in the nature of a writ of deceit. The jury found a verdict for the plaintiff in the court below for four thousand and five hundred dollars, and judgment having been arrested for insufficiency of the declaration, plaintiff brought a writ of error to this court.

The facts appear from the opinion.

Benson and T. A. Emmet, for the plaintiff in error.

Harison and Hoffman, for the defendants.

LANSING, Chancellor. The judgment in the court below having been arrested for certain reasons assigned in that court, which do not appear particularly specified on the record, but which having been adjudged to be well taken, judgment *pro forma* was entered for the defendants to enable the plaintiffs to bring his writ of error, as the same reasons which were alleged in arrest of judgment will be available here, to sustain the judgment thus rendered: Salk. 77.

The errors now relied on are similar to those alleged in arrest of judgment. They are: 1. That the plaintiff has not alleged in his declaration that the defendants made the affirma-

tions laid in it fraudulently; 2. That the plaintiff has not alleged that those affirmations were fraudulently made, or that they were known by the defendants to be false at the time; 3. That in the second and third counts the affirmations are stated to be by one of the defendants, without averring that he acted with the authority or privity of the other, and the jury have found an entire verdict on all the counts.

As to the first and second points, it is conceded that if the affirmations are laid to have been fraudulently made, it will supply the *scienter*. This being after verdict, and the errors assigned being supposed defects of the plaintiff's declaration, they present themselves, in a point of view, somewhat different from what they would have done on demurrer; for the verdict has ascertained those facts, which before, from the inaccuracy of the pleadings, might be dubious, since the law will not suppose that a jury, under the inspection of a judge, would find a verdict for the plaintiff, unless he had proved those circumstances, without which his general allegations are defective: 3 Bl. Com. 395; 1 Mod. 292.

It has repeatedly been held that, after verdict, the court will do what it can to help a declaration; that the court will suppose everything right, unless the contrary appears on the record: 1 Salk. 29; 3 Burr. 1725; 1 Wils. 255; and the general scope of the authorities is, that after verdict every legal intendment is to be admitted in its support. Though I have not been able to find any adjudged case so broad as to embrace the doctrine in the extent it is laid down in Comyn's Digest, 5 Com. Dig. 521, tit. Pleader, sec. 45, that a judgment, after verdict, shall not be arrested for an objection that would have been good on demurrer; and though, in speaking of the digest, the opinion of Comyn has been mentioned by Lord Kenyon: 3 T. R. 64, "as alone of great authority, since he was considered by his contemporaries as the most able lawyer in Westminster Hall;" and though I am rather inclined to think that so is the rational and legal doctrine, I refrain from giving an opinion on that subject, as I have no doubt of the correctness of the doctrine that everything ought to be done, which the court can do, to support the verdict; which is sufficient for the determination of the present case. For after the defendants have let slip their opportunity of demurring; after having led the plaintiff through every stage of litigation the forms of the court would admit; and after their defense has been decided upon by a jury, it seems to me it must be a radical defect incapable of being sur-

mounted which will induce this court to wrest the verdict from him.

The distinction laid down is, that a verdict cures everything which was necessary for the plaintiff to prove in maintenance of his action, but where the gist of the action is omitted, a verdict will not cure it: Cowp. 826.

Let us test this case by that distinction. The plaintiff, after stating in the first count of his declaration the assignment of three-fourth parts of the *Daily Advertiser*, and of the printing-presses, types, and other materials used therewith, which assignment is described as purporting that the defendants were proprietors and publishers thereof, presents a case which when stripped of its technical drapery, is, that the defendants did affirm to the plaintiff that the number of subscribers for the newspaper called the *Daily Advertiser*, exceeded nine hundred, and the profits thereof exceeded three thousand dollars by the year; that, confiding in such affirmation, the purchase of the newspaper, presses, types, and other materials, was made by the plaintiff of the defendants, for eleven thousand two hundred and five dollars; whereas, the number of subscribers was only six hundred, and there were no profits, and the plaintiff concludes with the words, "and so the said Samuel Bayard saith that he, by reason of the said affirmation of the said Richard M. Malcolm, and Samuel B. Malcolm, was falsely and fraudulently deceived, to wit, the day and year aforesaid, at the city and county aforesaid."

The epithets false and fraudulent, usually inserted in precedents, in actions of this kind, and invariably prefixed to the verb affirmed, are omitted here; and hence, it is said that the declaration is defective; but, after stating the affirmation and its falsity, it is positively alleged, that so the plaintiff was falsely and fraudulently deceived; a phraseology widely different from a charge of intending to deceive and defraud, as in the usual breach in the forms of declarations on single contracts, to which it has been likened, and positively applying the words falsely and fraudulently to the whole transaction preceding it. It was said in argument, that this concluding allegation was laid with a venue, on which the defendants might have taken issue; and the fact is, they did take issue on it.

The plea of not guilty was put in here. It is, in the abstract, a negation of moral turpitude; its denial is a strong implication that it has been attributed to the person who denies it. None can be inferred here, but from the allegations in the

declaration, which setting forth the affirmation and its falsity, attempts to establish the *scienter* from the situation of the defendants, as proprietors and publishers of the paper in question, or in connection with the concluding clause. Reject the inference, and strip it of the positive fraud attributed, and a simple affirmation remains, untrue, but not, therefore, in a moral sense, false. The declaration must have been understood as alleging a fraudulent affirmation, or the plea could not have been conceived in the terms it is. That this is the general issue in actions of deceit, is not a satisfactory answer, for it is an admission that this action was considered as included in that class, and clearly shows that there could be no misapprehension as to the object of the action.

The precise point put in issue will not admit of any other construction, than the existence or non-existence of the deceit. Here, therefore, there was no surprise upon the defendants; they came prepared to meet, and did meet the allegation of fraud. The rules of pleading are tested, as well as dictated, by good sense and sound logic. The science of special pleading is only a means for obtaining the ends of justice. Precision in its modes and terms, and certainty in its application, may be as effectually preserved, by compelling the pleader to exert his skill in conducting a cause properly to an issue in law or fact, with happier and more useful effect, than by a tardier exhibition of it, after the plaintiff has established a right of action against the defendant; and which is less entitled to regard, as it is not unfrequently premeditated, from the moment the declaration has been perused, to give a double chance to the defendant to defeat his antagonist, first, by meeting him on the merits, and, if unsuccessful on that ground, to take refuge under the forms of law, to secure himself from its justice. These attempts to stifle justice in the webs of form, in my opinion, merit no further countenance than the stern and unbending rules of law compel the court to yield; they ought always to be met with a disposition as far as the settled principles of law will admit, to frustrate them.

Upon the whole, it appears to me, that though the plaintiff, in his declaration, states his case in language somewhat variant from the common precedent, and though his arrangement of the subject differs from them, it contains every material allegation to entitle him to retain his verdict.

The other two counts are alleged to be defective, though on this no great stress was laid. This also resolves itself into a

formal objection, for it is to be collected from the record, and so admitted in argument, that all the counts related to the same, and not to diverse affirmations and sales. Unless this court can shut its eyes to a circumstance so obvious from every point which has been made in this cause; unless they can divest themselves of the knowledge derived from the admissions of the counsel made here in the course of the argument, this must be considered as indubitable, and yet the record alleges diverse and other assignments and affirmations, as the ground of each count succeeding the first.

That no averment can be admitted against a record, like many other general propositions, is correct only in degree. You may allege nothing to impugn its verity; but the common forms of proceeding and the established practice of the court may be resorted to in aid of the legal construction. The circumstance that those forms and that practice frequently imposed it on the party to vary his count for the same cause of action, so as to adapt it to the evidence he expects to adduce in its support, is so well known as to require only to be intimated to bring it fully to view. The intrinsic evidence furnished by the record shows that this is one of those cases in which the varied counts originate in, and depend upon, the same cause of action; for otherwise it would lead to the preposterous conclusion that there were three several newspaper establishments in the city of New York by the same title of *Daily Advertiser*, having precisely the same number of subscribers, and alleged to have yielded the same precise sum in profits; that the plaintiff purchased the interest of the defendants therein for the same price, at the same time, under similar circumstances of deceit, only varying the mode of practicing it, by the defendants, jointly and personally, by one separately, and by their agents. These singular circumstances might exist; but that they should, is, I think, too remote a probability to afford ground for a judicial decision, especially as to the title; for that three daily papers should be edited in the same city, under the same title, is wholly incredible, as the names of papers, it is well known, like the names of men, are imposed to distinguish one from the other, and the application of the same name to several establishments in the same city would confound all distinction between them. I do not mean to say that we know it to be otherwise *dehors* the record; for our knowledge so acquired is not a legitimate ground for decision.

This view of the subject leads to an irresistible conclusion,

that all these counts were for one and the same, and not for diverse causes of action, the fiction of law notwithstanding; it being a maxim of law that no fiction shall work an injury: 3 Bl. Com. 43. *In fictione juris semper subsistit equitas. Fictio legis nemini facit injuriam.* If this be so, what becomes of the reason on which this objection is founded? The risk of blending damages for a cause of action not maintainable at law with one that is, might have existed in the cases cited from Cro. Eliz. and Viner: Cro. Eliz. 685; Viner, tit. Judgment, E. pl. 1, etc., on the subject of action for words, but that reason is not applicable to this case.

In the case of *Peake v. Oldham*, Cowp. 275, Lord Mansfield, who so long and so ably presided in the British court of king's bench, while he pronounced the rule to be established, that where a verdict is taken generally, and any one count is bad, it vitiates the whole, observed, that it always struck him that it would have been much more proper to have said, that if there is any one count to support the verdict, it shall stand good, notwithstanding all the rest are bad. He adds, that it is contrary to the truth and justice of the case, the opinion of the judge, upon the merits, who tried the cause, and the meaning of the jury who pronounced the verdict. In the case of *Grant v. Astle*, Doug. 696, he laments that so inconvenient and ill-grounded a rule should have been established upon the fictitious reasoning that the jury has assessed damages on all, although, in truth, they never thought of the different counts; and he applies to it the epithet absurd. When it is considered how little attention is generally paid by jurors to the technical mode of stating the plaintiff's demand, these observations apply with great force. It cannot be doubted that this is a mere formal objection, and that to sustain it, would be repugnant to the real truth of the cause. It may turn the parties over to a new field of litigation, but it cannot comport with substantial justice. The common law is said to be the perfection of reason, and it will ill accord with that attribute, if instead of promoting justice, it immolates it as a victim to form.

I have a profound respect for the institutions and maxims which, having been ameliorated by the wisdom of ages, and sanctioned by the approbation of the sages of the law, have been transmitted to us as a precious inheritance; but, if in the gravity of legal disquisition, I might be permitted to indulge in figurative language, I would say, that I approach with reverence the fabric of special pleading, which has been raised with

so much skill and industry for our safety and protection; but if, in the lapse of ages, the buttresses which were intended to support the edifice, have been so inartificially and unskillfully constructed, as not only to destroy its symmetry, but instead of preserving it from the power of destruction, point it with more efficient force to its base; if, instead of sheltering the confiding citizen, who flies to it for refuge, it makes him more accessible to oppression, I am content to lend my aid to remove the incongruous mass, and to contribute to restore the noble structure to its pristine simplicity.

The rule now under consideration originated in the strict and precise notions of the times, with respect to special pleading. It was correct where the jury were expressly charged on each count, and their verdict distinctly taken on each; but in the gradual change in the manner of conducting business, it has become a cause of the extension of the evil which it was intended to remedy; for the declaration at the present day is seldom read to the jury. The general cause of action is stated, and the jury are informed, if there are several counts for the same cause of action, that these various counts have been laid to enable the plaintiff to recover according to his case; that the case is tried; the judge has the record, and the counsel are attentive to prevent any wandering from the point to be tried; so that the rule is now become palpable for its inutility and inequity.

It is not necessary, nor do I mean to examine the soundness of the objections to the other two counts. From the direction my examination of the subject has taken, it is not requisite to express an opinion respecting them. I am strongly inclined to think them good; but I confine my opinion to the sufficiency of the first count to sustain the action in deceit; and that the verdict ought to have been sustained on that ground, although the others may have proved defective. I am, of consequence, for reversing the judgment of the supreme court, and giving judgment for the plaintiff on the verdict.

CLINTON and L'HOMMEDIEU, senators, delivered concurring opinions.

WOODWORTH, attorney-general, delivered a dissenting opinion.

The majority of the court being of opinion that the judgment ought to be reversed, it was so ordered.

The courts elsewhere have noticed this case as to what errors in pleading a verdict will cure. See *Flanders v. Stewartstown*, 47 N. H. 550; *Richard-*

son v. *Farmer*, 36 Mo. 45; *Warren v. Littlefield*, 7 Me. 66; *McDonald v. Hobson*, 7 How. 758.

In the late case of *Ross v. Mather*, 51 N. Y. 114, its authority was affirmed, and the doctrine laid down that the words "falsely and fraudulently," when used to qualify a defendant's *animus* in making representations, are equivalent to a formal statement, or constitute a sufficient allegation of a *scienter*, even in an action of deceit. The same doctrine was laid down in *Thomas v. Beebe*, 25 N. Y. 249, on the authority of the principal case.

HALLETT v. WYLIE.

[8 JOHNSON, 44.]

DESTRUCTION OF LEASED PREMISES BY FIRE.—In an action for rent due on a lease, it was held that the destruction of the demised premises by fire, did not excuse the payment of rent by the lessee, according to his covenant.

DEBT for one year's rent. Plea, *nil debit*. The plaintiff produced a deed or "memorandum for a lease," between plaintiff and defendant, and bearing date February 26, 1804, by which plaintiff agreed to lease to defendant for the term of four years from May 1, then next, a house, etc., at a certain rent, payable quarterly. Defendant agreed to pay all taxes and assessments, and keep the internal part of the premises in good and sufficient repair; and entered and occupied under the lease, the execution of which was admitted. In December, 1804, the house, except the walls, was consumed by fire against the will of the tenant, so as to be rendered uninhabitable. Plaintiff has never repaired the house, although she had notice of the fire; and since the fire defendant has not occupied the premises.

Pursuant to the directions of the judge, a verdict was returned for the plaintiff for the amount of the debt and damages for its detention, subject to the opinion of this court.

Harison, for the plaintiff, urged that the lessee should have protected himself by the terms of his lease; as he has not done so he is liable: *Alleyn*, 27; *Strange*, 763; *Ld. Raymond*, 1479; 1 T. R. 311; *Id.* 705; *Hare v. Groves*, 3 Anstruther, 687.

Colden and Hoffman, for the defendant, contended that there was no express covenant to pay rent; that the instrument produced was merely a memorandum for a lease: 1 T. R. 735; 5 *Id.* 163; that where the thing is destroyed without any fault of the tenant, the rent shall abate: 6 Bac. Abr. 49, 50; *Rent*, M. 2; *Brown v. Quilter*, Amb. 619.

By Court, VAN NESS, J. This is a hard case upon the de-

fendant; and if the court could, consistently with settled and established principles, relieve him against the payment of the rent in question, we should most willingly do it. But it cannot be done, without overturning a series of decisions to which this court is bound to conform. We sit here "*jus dare*," not "*jus facere*." We think it may safely be said, that there is not a case in the books, where the destruction of the demised premises by fire, has been held to excuse the tenant from the payment of the rent on an express covenant; but in every case, where a defense on that ground has been attempted, it has failed: 2 Str. 763; *Monk v. Cooper*, 2 Ld. Raym. 1477; *Alleyn*, 27; *Paradine v. Jane*, 1 T. R. 705; *Doe v. Sandham*, 3 Burr. 1638. The law on this point has, in one of the late cases in England, been considered so fully established, that the court would not even hear an argument respecting it: 1 T. R. 810. We have found but one case, and that was in chancery, where the law on this subject has ever been doubted. But there the circumstances were special, and presented a case different from those to which the general rule has been applied: *Brown v. Quiller*, Ambler, 619.

On the argument, the counsel for the defendant, admitting the general rule to be against them, endeavored to take this case out of it. It was said, that the writing upon which this suit is brought, is not a lease, but a mere agreement for a lease, and that even if it were the former, it contained no express reservation of rent. Whether this contract is to be considered as a lease, or only an agreement for a lease, must depend upon the intention of the parties to be collected from the whole of the instrument: *Goodtitle v. Way*, 1 T. R. 735; *Roe v. Ashburner*, 5 Term, 163. There is nothing in it to show that the parties contemplated any further assurance. The words made use of, imply a present demise, and the fact of the defendant's entry under the agreement, and continuing in the occupation of the house, etc., from May to December, when the fire happened, is strong evidence to show that in the understanding of the parties, it was, in fact, a lease; and the period for which the premises were demised, as well as the terms upon which they were to be held, are definitely and accurately stated. Nothing, in our opinion, can be clearer, than that this is, to all intents and purposes, an executed contract. If the defendant had filed a bill for a specific performance, there can be no doubt that the chancellor would have told him, he had already the legal estate, and that he could not interfere. As to the idea that there is no

express reservation of rent in this agreement, if that were necessary, the defendant's counsel are certainly mistaken in point of fact. The premises are demised "at the rent of two hundred and sixty pounds per annum, payable quarter yearly, during the term of four years, the first payment of sixty-five pounds to be made on the first of August, 1804," etc. And at the conclusion of the contract, the defendant "agrees to take the said house and premises on the terms and conditions aforesaid." There is, therefore, in contemplation of law, not only an express reservation of rent, but a covenant to pay it. No particular technical words are requisite to make a covenant. Any words which import an agreement, between the parties to a deed, will be sufficient for that purpose: *Lant v. Norris*, 1 Burr. 290; Bul. Ni. Pri. 156; Cro. Jac. 899.

There was another point made on the agreement by the defendant's counsel, which I will briefly notice. It was said that the contract between the parties implied a covenant on the part of the plaintiff to rebuild the outer walls of the house; and that the court ought to hold the performance of that covenant to be a condition precedent to the plaintiff's right to recover the rent. The agreement by no means implies a covenant on the part of the lessor to rebuild; and if it did, it will be found, on examining some of the cases before cited, that even where the lessor was under a covenant to rebuild, in case the house should be destroyed by accidental fire, and he neglected or refused to do so, the lessee was notwithstanding held liable for the payment of the current rent. The court are, therefore, of opinion that the plaintiff must have judgment.

Judgment for the plaintiff.

See *Pollard v. Schaeffer*, 1 Am. Dec. 239, for a similar decision.

TILLOTSON v. CHEETHAM.

[3 JOHNSON, 56.]

MITIGATION OF DAMAGES IN LIBEL.—Judgment by default was taken in an action for libel, and a writ of inquiry to assess damages was had before the court. A motion being made to set aside the assessment of damages for misdirection of the judge, it was held that by the interlocutory judgment, the fact of publication, and the truth of the *innuendoes* were admitted, and that the defendant could not have the attention of the jury called to other paragraphs of the publication, showing a different meaning of the libelous words, nor could he offer in evidence in miti-

gation of damages the recovery of damages in favor of the plaintiff against the defendant in another action for a libel published in one of a series of numbers of the same paper, and which contained the same libelous words as were charged in the present suit.

EXEMPLARY DAMAGES.—The jury in assessing damages in an action for libel may properly take into consideration the position of the plaintiff, and his character as a public officer, with the view of giving exemplary damages.

LIBEL. After an interlocutory judgment for want of a plea, a writ of inquiry of damages was issued; and on the assessment plaintiff's counsel offered to read from the *Republican Watch Tower* of July 17, 1805, as containing the libel charged in the declaration. An objection on the part of defendant that the title of the paper was *The Republican Watch Tower*, and different from that described in the declaration, was overruled, the chief justice deciding that defendant, by not pleading, had admitted the libel as charged, and that plaintiff's counsel might read the words from the record or any paper which contained them. Evidence as to plaintiff's political conduct and the badness of his political character was not allowed, under the circumstances of the case. Defendant then offered in mitigation of damages a record containing an assessment of damages of one thousand and four hundred dollars in favor of the plaintiff against the defendant, for a libel published in the same paper July 8, 1805, and offered to prove that the libelous words charged in both declarations were contained in a series of numbers published by defendant in the *Republican Watch Tower*, and all relating to the manner and means of procuring the incorporation of the Merchants' Bank. Upon plaintiff's objection, this testimony was rejected.

Damages were assessed in the sum of eight hundred dollars; and a motion was made to set aside the inquisition for irregularity.

Foot and E. Williams, for the defendant.

Colden, for the plaintiff.

KENT, C. J. Several reasons are assigned why the assessment of damages in this case ought to be set aside:

1. It is alleged that the jury were restrained from examining the remaining part of the paragraph, or the parts of the publication which preceded and followed the libelous words selected. But this allegation does not appear to be supported. The affidavit, which is the ground of the motion, states that the counsel for the defendant did read to the jury "the remaining

part of the paragraph containing the libelous words," and that they drew their inferences "from the whole paragraph taken together." The jury had, then, before them, not only the libel but the context, and were left to form their judgment of the damages "from the whole tenor of the publication." It is further stated, that the jury were charged that the interlocutory judgment admitted the fact of the publication, and the truth of the innuendoes. Of the accuracy of this position, I cannot entertain a doubt. It is a well-settled rule, that the interlocutory judgment admits the cause of action: 1 Tidd's Practice, K. B. 523; 3 T. R. 302; and in a suit for a libel, those two facts are essential to establish the right of action. But it is added, that the jury were told that the defendant was estopped from calling their attention to the other paragraphs, to show a different meaning of the libelous words from that set up by the plaintiff. Most undoubtedly, the other paragraphs could not be considered with this view, and for this purpose, for it would be setting up a complete justification. If the defendant was to be permitted to show a different meaning to the words from that averred in the declaration, he would effectually destroy the right of recovery. The innuendoes are essential averments, and the interlocutory judgment confesses every material averment. When the affidavit was first read, it struck me that this part of it conveyed the idea, that the jury were directed not to pay any attention to the remaining paragraphs, even with a view to regulate the damages, and it led me to think, that the counsel who drew the affidavit had misapprehended the charge. But on examination of the affidavit, I am satisfied that it does not bear that meaning; and that, taken together, it substantially comports with my recollection of the opinion delivered to the jury.

2. The defendant offered in evidence, in mitigation of damages, a record containing an assessment of damages in favor of the plaintiff against the defendant, for publishing a libel on the third day of July, 1805; and he offered to prove that the libelous words in both declarations, were continued in a series of numbers published by him, which related to the manner and the means employed in procuring the incorporation of the Merchants' Bank. This testimony was rejected, and on a reconsideration of the point, I cannot but be of opinion that it was properly rejected. As the causes of action were wholly distinct (the one publication being on the third, and the other on the seventeenth of July), the admission of the record would have been without precedent, in the law of evidence. Although

both libels were contained in a series of publications relative to one subject, yet they were separate publications, circulated at different times, and many of them, probably, among different hands, and the jury who passed upon the first libel could not have had the second before them. I cannot perceive on what principle the assessment in the one case, should regulate that in the other, whether the damages given be considered as a compensation to the plaintiff, or as a punishment on the defendant. On the ground of recompense for actual injury, the first recovery ought clearly to have no influence upon the second. The plaintiff is entitled to his strict compensation for every injury. A satisfaction for one tort is no satisfaction for another. This will not be denied. But the argument for the admission of the record of the prior recovery proceeds upon the supposition, that a part of the damages are to be considered as monitory, and given for the sake of example; but in this view of the question, the position taken by the defendant's counsel appears to me to be equally untenable. A subsequent jury have no means of analyzing the damages contained in a former verdict, and of ascertaining the respective proportions given for recompense and for punishment. They cannot investigate the merits of the former cause; they have not the testimony before them. The doctrine is not to be confined to suits for defamation. It would apply to every case of tort; for juries, in all such cases, have a like discretion on the subject of damages. The rule, to be just must be mutual, and the plaintiff would have an equal right to show the former recovery, in order to enhance the damages by exhibiting the malignant and irreclaimable disposition of a defendant. But no such practice has ever been admitted, because each case ought to be governed by its peculiar circumstances; and it would be exciting prejudices against the party, foreign from the true merits of the cause. The principle would, as I apprehend, be mischievous in its operation. It would invite a repetition of injury, by the hopes of comparative impunity for the second offense; yet the repetition of an offense is evidence of deeper depravity, and calls for more exemplary punishment. Miserable would be the condition of civil society, if those who had once broken the law by attacking the peace, or wounding the character of their neighbors, could thereby acquire a valid plea for a future relaxation of its wholesome severities. We cannot at present foresee the extent of this doctrine. It would seem to require the admission of the record of a former recovery, in favor of a different plaintiff, for

a portion of the damages in that case may equally have been given for the sake of correction and example. Suppose the rule to be once established, how could it be known that the verdict in the former cause had not been reduced down to damages for actual injury, by the evidence of a still prior recovery? Would the plaintiff be permitted to show that such evidence had been given on the former trial? Is one recovery to be a standing shield to a defendant, against all subsequent suits, where positive damages cannot be computed, or how long will it be before the efficacy of the first recovery will become exhausted, so as to leave the jury to their usual discretion? It is far more easy for me to anticipate, than it would be to surmount, the embarrassments which might arise from the application of the doctrine.

I can readily admit that there may be cases in which the two offenses follow so near to each other, in point of time, that exemplary damages in the first case might answer all the beneficial ends intended by this species of animadversion. But the possibility of undue or unnecessary damages in a subsequent suit, will not affect an established rule. The rules of evidence are stable and uniform principles, which cannot bend to the hardships of a particular case, or yield to the discretion of courts. The record of a recovery for a like tort must, as a general rule, be admitted in mitigation of damages, or it must, as a general rule, be rejected. To admit it in particular cases only, and that, too, with limitations, would destroy the simplicity and certainty of the rule, and render the law of evidence vague and uncertain.

3. A third ground of the motion is, that the public character of the plaintiff, as an officer of government, and the evil example of libels, were stated by the judge to the jury as considerations with them for increasing the damages. And, surely, this is the true and salutary doctrine. The actual pecuniary damages, in actions for defamation, as well as in other actions for torts, can rarely be computed, and are never the sole rule of assessment. "In cases of criminal conversation, battery, imprisonment, slander, etc. (to use the words of Lord Camden, in 2 Wils. 206), the state, degree, quality, trade, or profession of the party injured, as well as of the party who did the injury, must be, and generally are, considered by the jury in giving damages." And in the case to which these observations were applied, he admitted, that the mere personal injury to the plaintiff was very small, but said that the jury had done right

in giving exemplary damages, as it was a case which concerned the liberty of the subject. In another case, which came before the court of C. B., for debauching the plaintiff's daughter: 3 Wils. 18, Chief Justice Wilmot observed, that actions of that sort were brought for example's sake; and that, although the loss to the plaintiff might not really amount to the value of twenty shillings, yet that the jury had done right in giving liberal damages. Again, in the case of *Pritchard v. Papillon*, Harg. State Trials, vol. 8, 1071, which was an action for maliciously causing the plaintiff, as lord mayor of London, to be imprisoned for a few hours, the chief justice charged the jury that though it was no easy matter to ascertain particular damages in such a case, yet that the malicious design of the party was to govern them, and that the government of the city and the honor of the magistracy were concerned, and put a weight upon their inquiry into the damages. But it cannot be requisite to multiply instances in which the doctrine contained in this part of the charge has received the sanction of the English and of the American courts of justice. It is too well settled in practice, and is too valuable in principle, to be called in question. As these were the only grounds of the motion which seem to have been relied on, or were material to examine, I am of opinion that the motion must be denied.

THOMPSON, J., and VAN NESS, J., declared themselves to be of the same opinion.

SPENCER, J. A judgment by default is an admission of the plaintiff's right of action, and where the damages are liquidated by the convention of the parties, witnessed by written documents, set forth in the plaintiff's declaration, the jury are bound to give the damages ascertained by the parties; there is no necessity of proving the note or writing thus set forth, though they must be adduced to the jury, that they may see whether indorsements have been made. In actions of a vindictive nature, such as the present, a judgment by default deprives the defendant of no other right than that of gainsaying the plaintiff's title to nominal damages, and of consequence, the printing and publishing the libel is admitted. With respect to real damages, the defendant has the same right to adduce evidence in mitigation of those damages as he would have had upon a plea of not guilty, after the publication of the libel, and the innuendoes had been proved. These are elementary principles, sanctioned as well by daily practice as by adjudged cases.

It then becomes a question, whether the evidence of a record of recovery by the plaintiff against the defendant was properly excluded. It was offered to be shown, in mitigation of damages, that the plaintiff had recovered against the defendant one thousand four hundred dollars, for publishing in the same newspaper containing the libel which is the foundation of the present suit, another libel, the innuendoes stated in both of which allege that the plaintiff and others had been guilty of bribery and corruption in obtaining the incorporation of the Merchants' Bank. It was also offered to be proved that the libelous words contained in both declarations were contained in a series of numbers published by the defendant, all of them relating to the manner and means employed in procuring the incorporation of the Merchants' Bank; that the paper containing the libel, for publishing which the said one thousand four hundred dollars had been recovered, was published on the third July, 1805, and the paper containing the libel for which this suit is brought was published on the seventeenth of the same month. It nowhere appears that a suit had been instituted for the publication of the first libel before the second was published.

The defendant could not have pleaded the recovery in the first suit in bar to the second, because they were, technically, distinct offenses, and the recovery in the former suit could be noticed in no other manner than as mitigating the damages in the second suit. It cannot be inferred, from the affidavit before us, that special damages have been alleged in the declaration in either suit. Hence it results, that the plaintiff, having already recovered one thousand four hundred dollars, for a libel of the same nature and tendency as the one which is the basis of this suit, without the allegation of any special damage in either case, would, on the second trial, recover as though the second publication was, in reality, a new, distinct and uncompensated offense. In vindictive actions, such as for libels, defamation, assault and battery, false imprisonment, and a variety of others, it is always given in charge to the jury, that they are to inflict damages for example's sake, and by way of punishing the defendant. In the present case, the chief justice, in charging the jury, inculcated the doctrine of giving exemplary damages, as a protection to public officers. It cannot, then, be denied, that by excluding the record of the former recovery, the defendant has again been assessed to the amount of eight hundred dollars, as though the present plaintiff had not recovered already for precisely the same kind of injury, and as though the

defendant had not been exemplarily punished for charging the plaintiff with conniving at the bribery of the legislature. It is said, that to admit this evidence would be innovating on the rules of evidence, and introductory of a new rule. No authority has been mentioned in support of this position, nor do I know of any rules of evidence which would exclude the testimony offered. New cases require the establishment of new rules, by the application of old principles; those principles warrant the giving facts and circumstances in evidence, which go to regulate the verdict, so as to arrive at a just result. It is, in my conception, evidently unjust, that a fact should be suppressed and withholden from the jury, which would and ought to lessen the damages; for what honest man would give to a plaintiff, who had already recovered a large sum upon the same charge, as much in a second suit, when his character had been rescued from the imputations thrown on it, and when the defendant had been punished for example's sake. I grant, that had it appeared that this libel was published after the defendant had been prosecuted for the publication of the third July, 1805, he would have deserved another punishment for example's sake; but this did not appear. It is easy to suppose cases where the injustice of refusing such kind of evidence as that now offered, would be universally felt and acknowledged; as, for instance, the sale of libelous publications by a bookseller. Every sale being a new publication, would it not meet the reprobation of mankind, to hold him alike obnoxious to damages for each publication, or to hold that the plaintiff had the same title to damages in the hundredth suit, as in the first? In every light in which I can view the subject, I am struck with the abstract justice of admitting the evidence offered, and I am unconscious that any part of the law of evidence is violated thereby. For refusing this evidence, in my opinion, the inquiry should be set aside, and a writ of inquiry *de novo* issue. I cannot yield my assent to the position of the chief justice, on the inquiry that the defendant's counsel were estopped from calling the attention of the jury to any other part of the context, to show a different meaning of the libelous words, from that alleged by the plaintiff, having already said that though the plaintiff was, in consequence of the default, entitled to nominal damages, yet, as respects real damages, the defendant was at liberty to urge to the jury, that the innuendoes were not warranted by the context, and that, from the libel collectively, he did not intend to attribute to the plaintiff any agency in bribing

the legislature. I dissent from the principle laid down by the chief justice, without giving an opinion whether the innuendoes were or were not warranted by the context.

Rule refused.

In *Taylor v. Church*, 8 N. Y. 461, Jewett, J., referred with approval to the doctrine laid down as to exemplary damages in this case; and on the same point the case is approved in *Waffle v. Dillenbeck*, 39 Barb. 133.

PIERSON v. HOOKER.

[3 JOHNSON, 68.]

RELEASE BY ONE PARTNER.—If one partner execute a deed of release under his hand and seal, in the firm name, of a debt due the firm, it extinguishes the debt, and the release is binding on the firm.

PAROL EVIDENCE INADMISSIBLE AGAINST RELEASE.—Where a release was given, expressing a release of all demands, parol evidence is inadmissible to show that a particular debt was not intended to be released.

ACTION on a bill of exchange drawn by defendant in favor of the plaintiffs, and accepted by the drawees. At the trial, the signatures of the defendant and of the acceptors were admitted, and also due notice to defendant of non-payment. It was proved that defendant promised payment after it became due, and the judge ruled that the promise to pay by the drawer was a waiver of the necessity to prove demand on the drawee, and notice to the drawer.

The defendant then produced a sealed instrument, bearing date subsequent to the maturity of the bill, and signed by one of the plaintiffs, partners in trade, in the name of the firm, by which he acknowledged the receipt of ten shillings in the pound, and in consideration of one shilling paid, released the defendant of and from all debts and demands of every nature and kind whatsoever. The judge decided that this release extinguished the debt. The plaintiff then offered testimony that at the time of the execution of this release it was not intended to affect the bill in question, and that the defendant had since promised to pay the bill. This testimony was objected to, and overruled, and plaintiffs nonsuited.

The case came before this court on a motion to set aside the nonsuit.

Foot, for the plaintiff.

Sedgwick, for the defendant.

KENT, C. J., delivered the opinion of the court. The release was executed by one of the plaintiffs in the partnership name. It is, therefore, impossible to doubt but that it was intended to affect and cancel partnership demands. The plaintiffs, however, offered parol testimony to show that the present demand was not one of those which were intended to be included. But the instrument is general and comprehensive, and expressly reaches to every debt and demand of every kind. To show by parol proof that it was not so intended, is to contradict or explain away the instrument, which is contrary to the established rule of law. It is again said that one partner cannot bind another by deed. This, as a general position, is correct; but it does not apply to the case before us. Here was no attempt to charge the partnership with a debt by means of a speciality, but it is the ordinary release of a partnership debtor. It is a general principle of law that where two have a joint personal interest, the release of one bars the other: *Ruddock's case*, 6 Co. 25, and I cannot perceive that the case of copartners in trade forms an exception to the general rule. Each partner is competent to sell the effects, or to compound, or discharge the partnership demands. He is to be considered as an authorized agent of the firm for all such purposes: *Watson*, 137, 141. Each has an entire control over the personal estate. So, in like manner, one co-executor or administrator cannot bind his companion to an obligation, but he may commit a separate *derastavit*, and release a debt. This court admitted the general principle, in the case of *Clement v. Brush*, July term, 1802, in which it was held that if one partner gave his separate bond for a copartnership, simple contract debt, the simple contract was extinguished by the specialty.

As the matter set up by way of defense was admissible and sufficient, it becomes unnecessary to examine an objection raised to the testimony in support of the plaintiff's right of action; that the plaintiffs did not prove a previous demand on the drawees of the bill. If this was now to be decided, it would perhaps be sufficient to refer to the case of *Lundie v. Robertson*, 7 East, 231, in which the very point arose, and the court of K. B. held that where the indorser had made a subsequent promise to pay, a previous demand on the drawer and due notice to the indorser were to be presumed, and need not be proved. This decision was agreeable to the ancient opinions of Lord Raymond and Ch. J. Lee, at *nisi prius*. (See MS. report of Burnet, in a note to the above case, and Str. 1246.) On this last point,

however, we give no definitive opinion; but on the ground of the competency and conclusiveness of the defense, the motion for a new trial is denied.

Rule refused.

SMITH v. LEWIS.

[3 JOHNSON, 157.]

NO ACTION FOR SUBORNING A WITNESS.—No action will lie against a person for suborning a witness to swear falsely in a cause in another state, in consequence of which a judgment was given against the defendant in the latter state, contrary to the truth and justice of the case.

WRIT of error taken by Smith, the plaintiff below. The facts of the case appear from the opinions.

P. Ruggles, for the plaintiff in error.

Tallmadge, for the defendant.

SPENCER, J. The declaration in this cause contains but one count; it sets forth, minutely, a suit brought by the defendant against the plaintiff and others, in a court of common pleas in the state of Connecticut, and afterwards removed to the superior court of that state, in which the defendant prevailed and obtained a judgment, after a trial before a jury, and the payment of that judgment by the plaintiff. It is then alleged that the defendant, in order to prove the matters necessary to maintain his suit, unlawfully and corruptly, and with a view and design to deceive the court and jury, and to injure the plaintiff, procured one Stephen Burritt to commit willful and corrupt perjury, by making a deposition altogether false, and known to be so by the defendant, and which was given in evidence on the trial; on which evidence, and no other, the defendant prevailed in said suit; also alleging that the defendant joined one Azor Ruggles as a defendant in that suit, to prevent his testifying to the facts he knew in that cause, and that the truth might be suppressed; that the said Azor could have disproved the falsehoods testified by the said Burritt; and that, but for the false deposition of Burritt, the jury would have found a verdict for the plaintiff and the others sued with him; and that there was no evidence of any weight to maintain the said issue, except that of Burritt.

To this declaration the defendant demurred specially, insisting that distinct matters are alleged in one count, to wit, the

subornation of Burritt and the joining Ruggles in the suit, to prevent his being a witness. To this there was a joinder, and judgment was given for the defendant.

The questions presented are: 1. Is it actionable to suborn a witness to bear false testimony, whereby a verdict is given contrary to the truth and justice of the case?

2. Is the declaration defective in containing the double allegation that the defendant did suborn Burritt, whereby the plaintiff lost his cause, and that he also joined Ruggles fraudulently, to prevent his being a witness, whereby Burritt could not be detected in his perjury?

However just and reasonable it may appear upon the first view of the proposition that a man who has by perjury injured another, and subjected him to the unjust payment of a sum of money, should be answerable, yet on a nearer inspection, when the mischiefs resulting from upholding that proposition are considered, the conclusion will be that it would be dangerous in the extreme to sustain this action.

First, however, as a point adjudicated, the decisions, whenever the point has arisen, are uniformly against the maintenance of the action. The question arose in the case of *Dampton v. Sympton*, Cro. Eliz. 520, whether the party committing perjury in falsely swearing on a trial that a fountain of silver was worth only one hundred and eighty pounds when it was worth five hundred pounds, was liable in an action, and it was held by all the judges, except one, that the action would not lie; and among other reasons not very conclusive, the court was influenced by its being totally unprecedented.

In the case of *Eyres v. Sedgwick*, Cro. Jac. 601, it became a question whether a person who had made a false affidavit in chancery, whereby the plaintiff was imprisoned by the chancellor, was liable to an action for the injury, and it was held by all the judges except Houghton that to punish this perjury by an action on the case, under pretense of a false oath, should not be suffered; and Houghton, who differed, admitted that if the defendant had come in by process of law, as a witness, it had been otherwise, for then he would have been punishable by indictment; but not in the case then before the court. Doderidge, J., in giving his opinion, says that in the case of *Skelhorn v. Harrison*, Cro. Eliz. 714, which was an action for putting in bad and false bail to discharge other good bail, the better opinion was that the action was not maintainable. The case of *Core v. Smith*, 1 Lev. 119, is not at variance with the cases cited, for there the

affidavit, whereby the plaintiff was removed from office, was not considered as the gist of the action, but only inducement to prove the malicious intent.

These are all the cases which have been cited or met with that bear on the question, and although they are all cases against the party committing the perjury, their application cannot be doubted; for if the very person who has committed the supposed injury is not answerable, surely the person procuring it will not be amenable. According to the rule of Lord Coke, it is better to submit to a particular inconvenience than introduce a general mischief, which, in my opinion, would be the case were we to maintain this action. If a perjury has been committed, let the defendant, who is alleged to have procured it, be punished according to the known law of the land, and not in a way altogether novel and unprecedented, nay, even against decisions. This case affords a sample of the danger of maintaining the action. Ruggles is alleged to have been made a party fraudulently, to prevent his being a witness, and most probably Ruggles is to be the witness to disprove the truth of Burritt's deposition. I do not mean to say anything against him, but it is obvious that he must feel strong inducements to retort on Burritt for having implicated him in the fraud. The old rule is the safest, that the parties must come prepared, at the trial, to vindicate themselves, and to detect the falsity of the testimony brought against them, if it be untrue; or they must take their chance of obtaining a new trial, by showing that they were surprised and that they have detected the imposition.

I confess that I should be afraid to make a precedent that would be so productive of litigation, and that would open a door to so much perjury as the one we are now called upon to establish.

The fraudulently joining Ruggles in the suit has not been pretended to be of itself a cause of action, and it becomes unnecessary to examine how far the declaration is bad on that account, since it is vicious in that part which contains the gist of the action. A decision of the superior court of Connecticut has been cited, to show that an action like this has been sustained; though I respect the decisions of that court, I cannot yield my settled conviction to any unauthoritative adjudication on the subject.

My opinion, therefore, is that the judgment below ought to be affirmed.

KENT, C. J. This suit is an attempt to overhaul the merits of the verdict and recovery in Connecticut. The defendant below recovered damages of the plaintiff, in that state, on a charge of fraud, in the sale of Virginia lands; and the plaintiff now alleges that there was no such fraud, and that the testimony which was produced in support of the charge, was procured by the corrupt acts of the defendant. If this be not an effort to try over again the merits of the former recovery, I must be greatly mistaken in my view of the case. The injustice of the recovery appears to be the real *gravamen*. The declaration does, in substance, tell the defendant that he had obtained a verdict and judgment against the plaintiff, which he ought not to have done, whereby the plaintiff is injured, and claims a return of the money so unjustly recovered. "Shall the same judgment," says Eyre, C. J., in the case of *Philips v. Hunter*, 2 H. Blacks. 414, "create a duty for the recoverer, upon which he may have an action of debt, and a duty against him upon which an action will lie? This goes beyond my comprehension." It would be against public policy and convenience; it would be productive of endless litigation, and it would be contrary to established precedent, to allow the losing party to try the cause over again in a counter suit, because he was not prepared to meet his adversary at the trial of the first suit. The general law of the land, and the rules of every superior court of competent jurisdiction, sufficiently provide against forcing a party to trial, without giving him a due opportunity to prepare for his defense, and cases of surprise and injustice are generally redressed by the discretionary power of the courts in setting aside verdicts. We are to intend that the judgment in Connecticut was fairly obtained in the regular course of justice, and it is conclusive as to the subject-matter of it, until it be set aside or reversed, either by the same court, or by some other court having appellate jurisdiction. It never can be opened in a collateral action. It is as binding upon the parties here, as it is in that state; for foreign judgments are never re-examined, unless the aid of our courts is asked to carry them into effect by direct suit upon the judgment. The foreign judgment is then held to be only *prima facie* evidence of the demand; but when it comes in collaterally, or the defendant relies upon it under the *exceptio rei judicatæ*, it is then received as conclusive; this distinction is taken and stated by some of the most approved jurists on the law of nations. The general doctrine in *Moses v. Macfarlane*, 2 Burr. 1005, has been

strongly questioned, and deservedly shaken by subsequent decisions, and especially by the case of *Merritt v. Hampton*, 7 T. R. 269; but if that case was admitted to stand in full force, it would not apply, as the plaintiff was there allowed to recover back money adjudged to the defendant in the court of conscience, because from the nature of the jurisdiction below, the plaintiff could not avail himself of his legal defense; no such pretext is allged as a ground of the suit in the case before us.

The case of *Hanford v. Pennoyer*, which was decided in the superior court of Connecticut, 1802, is also inapplicable; for the suit there was not against the party to the judgment, but against a third person, by means of whose fraud and perjury, the judgment was obtained; and even such a suit against a witness is, I apprehend, an innovation upon the English law, for it appears to have been frequently and directly denied by the English authorities: *Damport v. Simpson*, Cro. E. 520; *Eyres v. Sedgwick*, Cro. J. 601; *Harding v. Bodman*, Hutton, 11.

I am, accordingly, of opinion, that the judgment below must be affirmed.

VAN NESS, J., declared himself to be of the same opinion.

YATES, J., not having heard the argument in the cause, gave no opinion.

Judgment affirmed.

JARVIS v. HATHEWAY.

[3 JOHNSON, 180.]

WORDS NOT ACTIONABLE, QUESTION FOR JURY. — If words actionable, *per se*, be spoken between members of the same church, during religious proceedings connected with the discipline of the church, and without malice, no action will lie; and the question of malice is to be determined by the jury.

GROUND FOR NEW TRIAL. — In actions of a penal or vindictive nature, the court will not grant a new trial merely because the verdict is against the weight of evidence, unless some rule of law has been violated.

SLANDER. On the trial the plaintiff proved that the defendant, in the presence and hearing of C. and D., addressing himself to the plaintiff, said: "You are guilty of forgery;" and as stated by a second witness: "You are guilty of absolute forgery," which were the words charged in the declaration. It appeared that the words were spoken at a meeting of the parties before the witnesses, C. and D., who were members of the church to

which the parties belonged, and were convened for the express purpose of taking "the second step of labor in church discipline, and were with the parties alone, and acting under the rules of the church, and in pursuance of the precept or rule contained in the eighteenth chapter of the evangelist Matthew," which was set forth in the notice annexed to defendant's plea, to which plea was also annexed a notice of justification of the truth of the words charged.

The judge charged the jury that the words proved to have been spoken were actionable in themselves, but that they ought to be satisfied that they were spoken maliciously, or with a defamatory intent; that the circumstances under which the charge was made against the plaintiff, were proper to be taken into consideration to determine the intention. If it was made in the regular course of church discipline, and with an honest intention of examining whether the plaintiff was a fit member of the church, he was not entitled to recover. But if the charge was unfounded, and made with an intention of injuring the feelings and reputation of the plaintiff, the circumstances under which it was made, was an aggravation of the slander. A verdict was found for the defendant.

A motion for a new trial was made on the grounds: 1. Misdirection of the judge; 2. Because the verdict was against evidence.

Gold, for the plaintiff.

Hatheway, for the defendant.

By Court, SPENCER, J. The plaintiff's counsel have considered the charge of the judge as incorrect, in leaving it to the jury to decide whether the words spoken, which were actionable in themselves, were spoken maliciously, or with a defamatory intention.

I am perfectly satisfied that the charge to the jury was not only correct, but that no other charge could have been legally given. It is manifest from the case that the words were uttered in the course of church discipline by the defendant to the plaintiff, who were both church members; and whether such discipline was proper or not, is not a point for us to determine. Every sect of Christians are at liberty to adopt such proceedings for their regulation as they see fit, not inconsistent with law, or injurious to the rights of others. In actions of slander, it is of the essence of the action that the words be spoken maliciously, and that, as a matter of fact, belongs to the jury to determine.

If, however, the weight of evidence was against the defendant, as to the maliciousness of the words, it would be violating a salutary rule to grant a new trial. In penal actions, in actions for a libel and for defamation, and other actions vindictive in their nature, unless some rule of law be violated in the admission or rejection of evidence: 1 Burr. 54; 2 Salk. 644-8; or in the exposition of the law to the jury, or there has been tampering with the jury, the court will not give a second chance of success.

We are, therefore, of opinion that the motion for a new trial must be denied.

Rule refused.

SEARS v. BRINK.

[8 JOHNSON, 210.]

CONSIDERATION MUST BE IN WRITING.—Where a statute of frauds provided that “no person shall be charged on any promise, etc., unless the agreement on which such action shall be brought, or some note or memorandum thereof shall be in writing,” it was held, that an agreement relating to the sale of lands, must have the consideration for the promise, as well as the promise itself, in writing.

ASSUMPSIT. The first count stated an agreement between one Newkirk and the plaintiff, by which the plaintiff sold a lot of land to Newkirk, and which, by a certain agreement by one Farquhar and Lyon had been sold to plaintiff. Newkirk agreed to pay one hundred pounds, and the residue in four equal parts, the first before twentieth November, 1801, and the others before twentieth November, 1802, with interest, the deed to be given when the last payment was made. Afterwards, Newkirk agreed with the defendants to assign his interest, and the plaintiff agreed to accept them. On the twenty-third April, 1803, the defendants signed a note or memorandum of their agreement, indorsed on the former agreement as follows:

“This is to certify that Cornelius Brink and Cornelius Brink, Jr., have taken Peter Newkirk’s bargain of said lot of land that the within article mentions, and the said O. B. and C. B. Jr. are to pay the sum of three hundred and thirty-six pounds, fifteen shillings and four pence, which is the balance due on the said land to Benjamin Sears, this twenty-third of April, 1803.

CORNELIUS BRINK.

“CORNELIUS BRINK. Jr.”

The counsel for the defendants moved for a nonsuit, on the ground that there was no consideration for the *assumpsit*, and because the contract was not sufficiently proved. A verdict was found for the plaintiff, subject to the opinion of the court. On the argument, the principal point raised was, that Newkirk not being a party to the contract, it was void by the statute of frauds, for want of a consideration.

Hamilton, for plaintiff, maintained there was a sufficient consideration, for the release of Newkirk was giving up a benefit or advantage, and that the defendants went into possession under the agreement, and derived all the benefit of it. It is enough that the memorandum is signed by the party to be charged: *Pillans v. Van Mierop*, 3 Burr. 1663; 1 W. Bl. 363; 1 Caines, 45; 2 Id. 150.

Suydam, for the defendant, argued that Newkirk ought to have been a party, as it was in him the interest in the land was. If there was any consideration it must have moved from Newkirk. The want of a consideration cannot be supplied by parol: *Waine v. Warblers*, 5 East, 10; Roberts on Fraud, 116, 121.

By Court, VAN NESS, J. The first count in the declaration, which is a special one, is that on which the plaintiff is to recover, if at all.

The consideration to support the defendant's promise is averred to be, that Peter Newkirk agreed to assign or give up to the defendants the contract for the lot of land mentioned in the case. This is a material averment, and must be proved, or the plaintiff must fail.

It has been urged that a promise in writing without a consideration is valid, and the case of *Pillans & Rose v. Van Mierop & Hopkins* has been relied upon to support that position. But that case has been overruled both here and in England. See *Ballard v. Walker*, decided in January term, 1802; *Rann v. Hughes*, 7 T. R. 350, in the note; Roberts on Frauds, 7. A promise in writing, without a legal consideration to sustain it, is as much a *nudum pactum* as a parol promise. It was never the intention of the legislature to render that a valid contract when reduced to writing, which would not be so without it.

It remains, then, to be seen whether the plaintiff has given any legal evidence of the consideration stated in the declaration; and this depends upon the true construction of the eleventh section of the statute for the prevention of frauds.

On the part of the plaintiff, it is contended that the consid-

eration may be proved by parol, though it is admitted that the promise must be in writing.

On the part of the defendants, it is insisted that the consideration, as well as the promise, must be in writing, and that parol evidence can in no case be received to prove the consideration. The words of the statute are: "That no action shall be brought, etc., to charge, etc., upon any special promise, to answer for the debt of another, or to charge any person, upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, etc., or any interest in or concerning them, etc., unless the agreement on which such action shall be brought, or some note or memorandum thereof shall be in writing, signed by the party to be charged therewith," etc.

I am clearly of opinion that the consideration, as well as the promise, must be in writing. The statute provides that the party shall not be charged, unless the agreement upon which the action shall be brought, be in writing. This means the whole agreement, of which the consideration forms an essential and material part.

It is as necessary to the prevention of fraud and perjury that the consideration which leads to the promise should be in writing, as the promise itself. The word agreement comprehends the consideration as well as the promise. This is the construction which has been given to the statute, in a late case decided in England: *Waine v. Warlters*, 5 East, 10; and it appears to be a sound construction, and one which this court is disposed to adopt. The contract mentioned in the case, and upon which the present suit is brought, does not set forth the consideration with sufficient precision and certainty; if the parol evidence be excluded, the consideration is not proved, and the plaintiff must, therefore, fail.

The decision of this point renders it unnecessary to give my opinion on the other questions which were made on the argument.

The court are, therefore, of opinion, that according to the provision in the case, there must be a judgment of nonsuit.

Judgment of nonsuit.

Brown on Statute of Frauds, sec. 390, *et seq.*, gives a very accurate statement of the decisions on this question. He says: "In this country, such has been the contrariety of opinion upon the doctrine of *Waine v. Warlters*, that it would scarcely serve any useful purpose to attempt to

weigh the cases with a view to ascertain which way the balance of judicial opinion may incline. In each of the states the point has been presented, and in each has been decided as seemed to its courts wisest in point of policy, or most commended by authority. Of those states where the word 'agreement' is retained in the clause requiring the memorandum, the doctrine of *Waine v. Walters* is repudiated in Maine, Vermont, Connecticut, Massachusetts, North Carolina, Ohio and Missouri; but it has received the sanction of the courts in New Hampshire, New York, New Jersey, Maryland, South Carolina, Georgia, Indiana, Michigan and Wisconsin. In the statutes of some other states the word 'agreement' does not so occur, but the word 'promise' is coupled with it in the clause in question, and the courts of those states have generally dispensed with the statement of the consideration on the ground of that difference."

The case has been indorsed by the authority of the highest courts in New York: See *Justice v. Lang*, 42 N. Y. 522; *Church v. Brown*, 21 Id. 316; *Brewster v. Silence*, 8 Id. 213; *Thompson v. Blanchard*, 3 Id. 339; *Durham v. Manrow*, 2 Id. 550. The New York statute now requires the consideration to be expressed in the writing: *Justice v. Lang*, *supra*.

FOOTE v. COLVIN.

[3 JOHNSON, 216.]

WHO MAY MAINTAIN TRESPASS.—Where the owner of land agreed with another to cultivate the land on shares, they may jointly maintain an action of trespass against a third person who cuts and carries off the crop.

RESULTING TRUST.—If A. buys land with the money of B. and takes a conveyance to himself, he will be considered a trustee for B.; and such an implied or resulting trust is not within the statute of frauds, and may be proved by parol, and the land may be sold on an execution under a judgment against B., the *cestui que trust*.

TRESPASS for taking and carrying off a large quantity of rye and wheat. Not guilty pleaded, with notice that defendants would give in evidence that the *locus in quo* was the freehold of Colvin, and the cutting and carrying away were done by his orders.

It was proved that Litchfield, one of the plaintiffs, sowed several acres of Sowls's farm with rye, which farm, on the twelfth May, 1804, had been conveyed to Foote by Sowls, in fee; that Foote was to have one-third of the crop and Litchfield the remainder. It appeared that James Litchfield, the father of one of the plaintiffs, lived with his family on the farm, when the rye was sown, and that Brett, at the time it was cut, was in actual possession as tenant under Foote. The cutting and carrying off the rye was proved.

A motion for a nonsuit, on the ground that plaintiffs had not

shown a joint property in the rye, was overruled. Defendant then offered to prove that the farm in question had been purchased with the money of the elder Litchfield, who allowed the conveyance to be made in Foote's name, to avoid a judgment recovered against him in July, 1803, in favor of Hunt; that Foote was never in possession, but had given a lease to Brett, after the absconding of the elder Litchfield in 1806, who had, until that time, lived on the farm; that the agreement between Foote and Litchfield, as to the division of the crop, was made with the privity of James Litchfield, and with intention to defeat any execution on the judgment in favor of Hunt; that in June, 1806, the sheriff, by virtue of an execution on that judgment, sold all the title and interest of James Litchfield in the farm to Colvin, by whose orders the rye was cut and carried.

The chief justice rejected this evidence as being inadmissible under the general issue, and, if admitted, would merely establish a trust estate in James Litchfield, of which a court of law could take no notice. Verdict for plaintiffs.

A motion for a new trial was based upon grounds which appear from the opinion.

Henry, for the defendants.

Kirlland and Champlin, for the plaintiffs.

By Court, SPENCER, J. On the motion for a new trial, the defendants' counsel have insisted:

1. That the plaintiffs did not prove a joint property in the rye, which was the subject of the suit;

- 2 That the parol evidence offered and overruled, ought to have been admitted, to show that James Litchfield furnished to Foote the purchase-money with which the *locus in quo* was bought; as it created a resulting trust for James Litchfield;

3. That such resulting trust estate was liable to be sold on the execution issued at the suit of Hunt, and being sold to Colvin, he thereby acquired the legal interest in the land, and in the growing crop;

4. That the evidence thus offered and overruled was proper under the general issue.

On the first point, I am inclined to think that the plaintiffs had a joint property in the growing crop. Assuming for the present, that Foote was the legal owner of the land, E. Litchfield sowed on shares, and on reaping the crop, they were to have it in certain proportions. This case differs from that of *Newcomb and others v. Ramer*, 2 Johnson, 421, in the notes, in

this, that the rent was of no proportion of the crop, but was specific as to the amount. This opinion is supported by the case of *Hare et al. v. Celey*, Cro. Eliz. 143, and seems best to promote the intentions of landlord and tenant. If the portion reserved for the landlord was to be considered as rent, and in which he had no interest until severance and delivery, it would put it in the power of tenants clandestinely to alienate the produce of the land, to the injury of the person who had enabled them to raise the crop.

The second point has been virtually decided in the case of *Jackson ex dem. Kane v. Sternbergh*, 1 Johnson, 45, in note. In that case, Kane had obtained a judgment against Sternbergh, and his lands were sold on an execution to Cox, at the instance of the plaintiff. The sheriff gave a deed to Cox, and he conveyed to the plaintiff. It was decided that the lessor of the plaintiff was the real purchaser, by Cox, his agent, and that his purchase was a resulting trust, which might be proved by parol. It seems to be perfectly well settled that if A. buys land, and takes a conveyance in the name of B., it is a resulting trust for him who pays the purchase-money, raised by implication of law, and, therefore, saved by the statute. There is a diversity of opinion, whether, notwithstanding such trusts are not affected by the statute, there should not be a declaration in writing, or an acknowledgment in the deed from whom the consideration moved. In the case of *Ambrose v. Ambrose*, 1 P. Wms. 323, the lord chancellor is reported to have said that "it plainly appearing, upon the evidence on both sides, that the consideration money of this purchase was the proper money of A., had it not been for the statute of frauds this would have made a resulting trust." However great the authority of Lord Hardwicke deservedly is, he is opposed by various decisions, and the opinions of elementary writers. The cases in 2 Velt. 361 and 1 Vern. 367, *Gascoigne v. Thwing*, consider such trusts as saved by the statute without any deed declaring them, it being required that the proof should be clear, that the purchase-money was really the property of him who claims the estate. To the same effect are 3 Wooddeson, 439, and 21 Vin. 497, in the notes. In the present case, the evidence offered and overruled would, we are to presume at present, have established the fact that the farm was purchased with James Litchfield's money, and that Josiah C. Foote was the mere pipe of conveyance. This proof would consequently have shown an estate in James Litchfield, liable to be sold on execution under the fourth sec-

tion of the act concerning uses: Rev. Laws, vol. 1, p. 68, sec. 4. Indeed, without the aid of that statute, I consider James Litchfield, if he advanced the purchase-money, as having an interest liable to be sold on execution. This evidence, then, was improperly overruled.

There may be an interest in growing crops in one man, whilst the title to the land is in another. The one does not necessarily follow the other; but when the right to any portion of the crop exists in the owner of the soil, there, unless in certain excepted cases, the ownership of the land draws after it that of the crops, and it cannot admit of a doubt that a sale of the land simply, by the owner of both the land and crop, carries the property of the crop to the purchaser. If a voluntary sale would do this, a sale under an execution will produce the same consequences. It follows, then, that Foote, being a trustee for James Litchfield, and it being a resulting trust, susceptible of parol proof, and the interest of Litchfield being vendible under execution, Colvin, as a purchaser on the sheriff's sale, acquired all Foote's right, both to the land and the crop. Foote then ceased to have any interest, and in this point of view the proof would have shown that the plaintiffs had not a joint interest in the rye.

This was proper evidence under the general issue, it being a settled and established principle that anything may be given in evidence that amounts to a denial of the right, and particularly of a freehold in the defendant, to the *locus in quo*: 7 T. R. 855; 8 T. R. 405; 1 Ld. Raym. 732; 1 Leon. 301; Gilb. Ev. 258.

The court are of opinion that a new trial ought to be granted, with costs to abide the event of the suit.

New trial granted.

The case holds what is generally the received doctrine that the estate of the beneficiary, where there is a resulting trust, may be taken on execution; though in New York, under the present statute, it is otherwise. See *Garfield v. Hatmaker*, 15 N. Y. 478; and see Freeman on Executions, sec. 189, where he says: "The majority of the authorities inclines to the view that the estate may be taken on execution the same as though the trust was expressed in the conveyance. This majority is opposed by a minority very equal in number and importance."

RUGGLES v. KEELER.

[3 JOHNSON, 263.]

STATUTE OF LIMITATIONS OF ANOTHER STATE CANNOT BE PLEADED.—

The defendant in an action here may set off demands against the plaintiff arising when both parties resided in Connecticut, notwithstanding that such demands would be barred by the statute of limitations of that state, provided six years have not elapsed since the plaintiff came into this state.

ABSENCE FROM STATE PREVENTS STATUTE RUNNING.—The saving in the statute of limitations extends to foreigners, or those who have never resided in the state, as well as to citizens who may be temporarily absent.

WRIT of error. Keeler brought his action against Ruggles, on a promissory note given to him by the latter for eighty-four dollars and thirty-four cents, payable on demand, and bearing date April 4, 1803. Defendant pleaded *non-assumpsit*, with notice of special matter to be given in evidence.

On the trial, in 1807, the defendant proved that Keeler had transferred the note to Lewis in March, 1806, whose property it was at the commencement of the suit; that Lewis was an inhabitant of Connecticut, where Ruggles had lived previous to April, 1802. The defendant then offered to prove that between February, 1796, and March, 1797, he had rendered services for Lewis to the value of one hundred and thirty-three dollars, and in January, 1797, had sold goods to him to the amount of sixty-eight dollars. This evidence was objected to on the ground that these demands were barred by the statute of limitations of Connecticut, six years having elapsed since the right of action accrued. The objection being sustained, defendant excepted.

P. Ruggles, for the plaintiff in error, urged that by the statutes of New York, vol. 1, p. 561, the right of the creditor to bring his action was until six years after the return of the debtor to this state; that the court should not regard the statute of limitations of another state: *Nash v. Tupper*, 1 Caines, 402 (2 Am. Dec. 197); *Smith v. Spinolla*, 2 Johns. 198; *Pearsall v. Dwight*, 2 Mass. 84, ante 85.

J. Tallmadge, for the defendant, contended that the case was not within the words of the *proviso* of the New York statute; that the statute of limitations of Connecticut having commenced to run, it may be pleaded in bar to an action here: *Smith v. Hill*, 1 Wilson, 134.

By Court, KENT, C. J. This case presents an important

question arising under the rules of prescription which prevail in the different states. An inhabitant of Connecticut sues here upon a promissory note, and a demand arising between the parties, while they were respectively inhabitants of Connecticut, is now offered by way of set-off. This demand is objected to, as barred by the statute of limitations of Connecticut, as well as of this state.

The first question which naturally arises is, whether the act of limitations of this state can be interposed in bar to the matters contained in the set-off.

The act requires that all actions founded upon any contract, without specialty, shall be brought within six years next after the cause of action accrued. These words would, undoubtedly, unless controlled by the exception in the statute, apply even to the case of foreigners, and to causes of action arising abroad. The statute of 21 Jac. 1, was so understood by Lord Ch. Cowper, in the case of *Duplein v. De Roven*, 2 Vern. 540, which arose shortly before the statute of Anne, and he observed that "it was plausible and reasonable, that the statute of limitations should not take place, nor the six years be running, until the parties came within the cognizance of the laws of England; but that must be left to the legislature." But a proviso in the statute of Anne, and which we have adopted in our act of limitations, saves the operation of the statute, if the party shall be "out of the state" at the time the cause of action arises against him, and the statute does not begin to run until "after the return" of the defendant. Whether the defendant be a resident of this state, and only absent for a time, or whether he resides altogether out of the state, is immaterial. He is equally within the proviso. If the cause of action arose out of the state, it is sufficient to save the statute from running in favor of the party to be charged, until he comes within our jurisdiction. This has been the uniform construction of the English statutes, which also speak of the return from beyond seas of the party so absent. The word return has never been construed to confine the proviso to Englishmen who went abroad occasionally. The exception has been considered as general, and extending equally to foreigners who reside always abroad. This was evidently the opinion of Lord Talbot in the case of *Duplein v. De Roven*. In *Strithorst v. Greame*, 3 Wils. 145; 2 Black. Rep. 723, S. C., the point was so ruled by the court of C. B. in England.

The party to be charged by the set-off, not having been six

years within this state since the cause of action arose, our statute of limitations could not, therefore, be replied to the plea. The next question is upon the Connecticut statute of limitations.

In *Nash v. Tupper* (2 Am. Dec. 197), this court determined that we were bound to confine ourselves to our own statute of limitations, and could not regard that of any other state. The question arose there upon a replication to the usual plea of *non assumpsit infra sex annos*. The replication stated that the cause of action arose in Connecticut, and that the demand was not barred by the act of limitations of that state, and upon demurrer this replication was held ill. And whether we consider the question upon principle or authority, I am satisfied that the decision in that case was correct. The general doctrine which we there recognized, goes far towards settling the present question. A foreign statute of limitations can no more be pleaded to a suit instituted here, than it can be replied to a plea under our statute. Statutes of limitations are municipal regulations, founded on local policy, which have no coercive authority abroad, and with which foreign or independent governments have no concern. The *lex loci* applies only to the validity or interpretation of contracts, and not to the time, mode or extent of the remedy. Suppose Ruggles had sued Lewis upon the account attempted to be set off in the court below, the defendant could not have interposed the statute of limitations of Connecticut by way of plea; and the rule is the same, whether the foreign statute be interposed against the demand of the plaintiff or the set-off of the defendant. It was stated upon the argument, as a plausible objection to the rule that stale demands might, in this way, be revived and enforced against persons who happen to be found in this state, and have not resided here long enough to be protected by the statute of limitations of this state.

The answer is, that a presumption of payment will undoubtedly attach to stale demands. When this presumption is to be let in, will depend upon the age and nature of the demand, and the special circumstances under which it may present itself. We do not at present undertake to lay down any precise rule on the subject. It is sufficient to observe, that this presumption of payment must, as a matter of evidence, be left in each case to be raised or repelled by the respective parties, and in this way any serious inconvenience from the revival of dormant claims will be avoided.

In the present case, the court below rejected the evidence of

the set-off, and their decision was, therefore, erroneous, and must be reversed.

THOMPSON, J., and YATES, J., not having heard the argument in the cause, gave no opinion.

Judgment reversed.

JACKSON v. BLANSHAN.

[3 JOHNSON, 292.]

WHEN WILL ENTITLED TO BE READ IN EVIDENCE.—In order to entitle a will to be read in evidence, without proof by the subscribing witnesses, it must be at least thirty years old, reckoned from the testator's death.

EXECUTORY DEVISE.—A devise of "all his estate, real and personal, to his six children, to be equally divided between them, share and share alike; but if any of them died before arriving at full age, or without lawful issue, then his, her or their part or share should devolve upon and be equally divided among the surviving children, and their heirs and assigns forever," was held to be good as an executory devise, and that the share of one of the sons who died without issue, after the death of four of the other children who left issue, went to the only surviving child.

EJECTMENT. Plaintiff's lessors claimed under the will of Matthys Blanshan, the father of Brachie, one of the lessors. The testator died about 1780, leaving six children, all of whom were deceased except Brachie, and all left issue except Matthew. Matthew had mortgaged the premises to the loan officers of Ulster, by whom they were sold, and under whom defendants claimed. Matthew died in 1804.

The will of Matthys was offered in evidence, and rejected, no reason being shown why one of the subscribing witnesses, who lived at Poughkeepsie, was not produced to prove it. A second subscribing witness was *non compos*, and the other deceased. Plaintiff then offered to prove a partition of the lands of the testator among his six children, and that Matthew took the premises in question as his share, which the other children said had become divested according to the will. The will was then admitted, from which appeared, after certain legacies, a devise to the testator's six children, of all his property, real and personal, share and share alike; "but if any one or more of my above-named children should die before they arrive at full age, or without lawful issue, that then his, her or their part or share of my estate shall devolve upon and be equally divided among the rest of my surviving children, and to their heirs and

assigns forever." It appeared that the other four children died before Matthew, leaving issue that were still living.

A verdict was taken for the plaintiff, subject to the opinion of this court.

L. Elmendorf, for the plaintiff, insisted that the will had been properly admitted, 5 East, 259; Peake's Ev. 109, 110; Buller's N. P. 255; and that the will was good as an executory devise: *Fosdick v. Cornell*, 1 Johnson, 440 (*ante*, 340); that Matthew took all the interest of the four children who died before him, and Brachie took his share, he having left no issue.

Suydam, contra.

SPENCER, J. The questions in this case are, whether the will of Matthys Blanshan was well proved; and whether Brachie, the wife of the lessor, alone took the share of Matthew, one of the children of the testator.

It has been decided in this court, that a will stood upon the same footing as a deed, with respect to proof; and that an ancient will was subject to the same rule of evidence as an ancient deed. The will is dated the twenty-first of April, 1770; but the testator did not die until 1780, or 1781. A will does not take effect until the testator's death; but it conveys only the lands of which he was seised when it was made, if the devise be ever so broad; and, therefore, though not consummated until the death of the deviser, it relates back to the time of the devise. The reason of the law, in dispensing with the attendance of witnesses, to a deed of thirty years' standing, and where possession has been held under it, is founded on the presumption that they are dead, and the impossibility of proving its execution; and though they are, in fact, alive, it is not necessary to produce them, for the rule is general in its operation. The reason of this rule applies to the time of the execution of a will, and not to the death of the testator, for the same difficulty of proof exists in the one case as in the other. I think, therefore, that when wills and deeds have the same principle applied to them, as respects their proof, it is following the analogy to consider a will as an ancient one, when thirty years have elapsed since its execution; and that it may be read in evidence, where the possession has been held according to its provisions, for twenty-seven years, as is the present case.

If this be correct, the production of the will, the proof that all the children held under it, and had divided the estate according to its provisions, was sufficient proof, *prima facie*, of its execution.

In the case of the *Governor & Company of the Chelsea Water Works v. Cowper*, 1 Esp. Case, 275, Lord Kenyon admitted a bond to be given in evidence, saying that all deeds of above thirty years' date proved themselves; and that it added to its authenticity, coming from among the papers of the company, and being in the handwriting of their secretary; and a case is cited by Lord Kenyon, where Lord Mansfield declared that he would admit a bond of above thirty years' standing, if proved to have been found among the papers of the deceased. The ancient rule required the lapse of sixty years before a deed proved itself; this rule has been narrowed to thirty years, and as by our statute of limitations, the possession of land for twenty-five years gives a title against all the world, I consider a deed of more than thirty years' standing, and where possession has been held under it for twenty-five years, good evidence, without proving its execution.

The devise is to the testator's six children, and their heirs and assigns for ever, as tenants in common. But if any one or more of the children should die before they arrive to full age, or without lawful issue, then his part is to devolve upon, and be equally divided among the rest of the testator's surviving children, and to their heirs and assigns for ever. Matthew died without issue, after the death of four other of the devisees with issue, leaving Brachie the only surviving child of the testator.

Though the real and personal estate are both given in the same manner, it would be violating the plain intention of the testator to consider this a void limitation over, because the personal estate might admit of other constructions; and since the case of *Fosdick v. Cornell*, ante, 340, it cannot be contended that the devise means an indefinite failure of issue, but only a failure of issue living at the death of the first taker. That case is an authority for saying that the devise here created a good limitation over, by way of executory devise, depending on the contingency of any of the devisees dying without leaving issue at the time of their death.

The grandchildren cannot be considered as the surviving children, within the intention of the testator. The plain language of the limitation would be violated by giving it such a construction, and, indeed, it was not pressed.

In my opinion, Brachie took the whole share of Matthew on his dying without issue, and the plaintiff is entitled to judgment.

KENT, C. J. The first question arising in this case is as to the admission of the will of Matthys Blanshan. The acts and declarations of the children might perhaps have been sufficient ground for presuming a will dividing the estate, according to the distribution which actually took place, had there not been positive proof behind of the existence of the will. Presumptions are only allowed when positive proof is wanting; but here the lessors of the plaintiff admitted that they had in their hands the will itself. They were then bound to produce it, and support its genuineness by such proof as the nature of the case afforded. The highest and best evidence was the production of one or more of the subscribing witnesses to the will, if they were living, and within the jurisdiction of the court. It was proved that one of the subscribing witnesses was alive, and resided in Dutchess county, and no reason was given why he was not produced. This omission was a fatal negligence on the part of the plaintiff, unless the admission of the will can be supported on the footing of an ancient deed, which proves itself. Here, I think, also the lessors of the plaintiff have failed. It is not proper to compute the will from its date, but only from the time that possession took place under it. It is the accompanying possession alone which establishes the presumption of authenticity in an ancient deed: Gilb. 89; Peake, 72, 73; Fleta, 426; 1 Inst. 6; 1 Rol. Rep. 132; Skinner, 239; 2 Mod. 323; 2 T. R. 466; 1 Black. Rep. 532. In one of the cases referred to, Lord Coke says that possession must have gone all the time, according to the deed, before a feoffment of forty years' standing can be admitted without proof of livery. Where possession fails, the presumption in its favor fails also. The length of the date will not help the deed; for if that was sufficient, a knave would have nothing to do but to forge a deed with a very ancient date. The death of the testator could not have exceeded twenty-six or twenty-seven years, before the commencement of the suit, and the time of the possession under the will fell short of the lowest period which has been required to establish an ancient deed.

Perhaps thirty years may be deemed unreasonably long, since it reaches beyond the limitation now established in a writ of right. But it is to be observed that the rule requiring thirty years as the test of an ancient deed, is an old and well settled rule of evidence; and that it has been applied to a variety of instruments, besides conveyances of real estate, such as bonds, certificates of settlement and the like. It may, therefore, well

be questioned whether greater inconveniences would not be felt from a departure from that rule, than from adhering to it, in the present instance.

On this ground a judgment of nonsuit ought to be directed, according to the stipulation in the case. But as we have the will before us, and the counsel have argued on the merits of the controversy, arising on the construction of the will, it may probably be convenient to the parties, and save further litigation to have the opinion of the court on the will.

The will devises the real estate to the six children in fee, of whom Brachie, one of the lessors, was the youngest, and the only survivor; it then adds the following devise over: "But if any one or more of my said children should die before they arrived at full age, or without lawful issue, that then his or her share should devolve upon, and be equally divided among the rest of my surviving children." This devise over is good by way of executory devise, and not too remote; for the construction is well settled that the words "without lawful issue" mean issue living at the time of his death. The case of *Fosdick v. Cornell*, 1 Johns. 440, was on a devise to four sons and a daughter, and that if any of them should die without heirs male of their bodies, their share should go to the survivors. The court reviewed the leading authorities, and held that the devise over was a good executory devise, and that the true construction was a devise over, to take effect on failure of male issue, during the life of the first taker. The case of *Hanbury v. Cockerill*, 1 Rol. Abr. 835, is an ancient case, quite analogous, in favor of the validity of this executory devise. The devise there was to the two sons in fee, with a *proviso* that if either died before they should be married, or before they should attain the age of twenty-one years, and without issue of their bodies, then his share should go to the survivor. In the two cases of *Porter v. Bradley*, and *Roe v. Jeffery*, 3 T. R. 143; 7 Id. 589, Lord Kenyon supported this established construction in a very forcible manner, and the present case cannot be distinguished in principle from those in which this rule of law is settled beyond controversy. The lessors of the plaintiff would, therefore, be entitled to recover on the merits of the case, and it is with regret that I am obliged to turn them round to a new action; but according to the stipulation in the case there must be a judgment of nonsuit.

VAN NESS, J., was of the same opinion.

THOMPSON and YATES, JJ., not having heard the argument in the cause, gave no opinion.

Judgment of nonsuit.

The authority of this case is well sustained on the point as to an executory devise: See *Wilkes v. Lion*, 2 Cow. 394; *Paterson v. Ellis*, 11 Wend. 292; *Roone v. Phillips*, 24 N. Y. 469; *Guernsey v. Guernsey*, 36 Id. 271; 2 Washburne on Real Prop. 684; 3 Id. 527; *Richardson v. Noyes*, ante, 24; holding a similar rule. On the question of a will or deed thirty years old being admissible in evidence, without proof of execution, its authority has been doubted in *Jackson v. Blanshan*, 6 Johns. 54; *Willson v. Betts*, 4 Denio, 213; *Hewlett v. Cock*, 7 Wend. 371, 374. But in *Jackson v. Davis*, 5 Cow. 127; *Jackson v. Christman*, 4 Wend. 282, its authority on this point is recognized.

In *Enders v. Sternbergh*, 1 Keyes, 264, it is held that a deed appearing to be of the age of thirty years may be given in evidence without proof of execution, if such an account of it be given as may under the circumstances be reasonably expected; and such as affords the presumption that it is genuine. The correct doctrine held by the New York courts is stated by Selden, J., in *Clark v. Owens*, 18 N. Y. 437. He says: "In England, if the deed appears to have been in existence for thirty years, and during that time to have been in the proper custody, it is held to be admissible without further proof. In this state, however, something more has been generally required. There must be not only direct proof or evidence warranting the inference that the deed has been in existence for thirty years, but something in addition to establish the authenticity of the instrument. If possession has accompanied the deed for that length of time, that is enough. If not, other circumstances may be resorted to for the purpose of raising the necessary presumption in favor of the deed." This doctrine is also supported by the following: *Carter v. Chandron*, 21 Ala. 72; *Beall v. Dearing*, 7 Ala. 124; *Doe v. Roe*, 31 Ga. 593; *Hedger v. Ward*, 15 B. Mon. 106.

GRISWOLD v. NEW YORK INSURANCE CO.

[3 JOHNSON, 321.]

RIGHT TO ABANDON.—A policy was made on freight from New York to Barcelona. The vessel, while proceeding out of the harbor on the voyage insured was stranded, and the cargo, consisting of flour, was so damaged that it would not be worth the freight to carry it to its place of destination. Information was given to the insurers at the time of the accident, and two days afterwards the insured abandoned as for a total loss. The vessel was repaired in seventeen days, enabling her to prosecute the voyage, at an expense of one hundred and fifty dollars. The cargo, which was insured by others, had also been abandoned and accepted by the insurers, and sold at auction at a loss of about twenty-seven per cent. It was held that the insured on the freight had no right to abandon, but should have offered to the owners of the cargo to carry it to its place of destination, so as to entitle them to the freight.

SAME.—Where goods are carried to the place of destination and found damaged so as to be of no value, the owner cannot abandon the goods for the freight, but the owner is entitled to his full freight for the transportation of the goods.

Action on a policy of insurance on the freight of the ship Culloden, on a voyage “at and from New York to Barcelona, with liberty to touch at Gibraltar.”

On a second trial of this case, a special verdict was found containing the following facts: The vessel in going out of New York harbor, on the voyage insured, stranded, thereby so damaging the greater part of the cargo, which consisted of flour, that it was totally unfit to be reshipped, and would have been worth nothing at the port of destination. On the day of the accident, March 3, 1804, plaintiffs notified defendants, and on the fifth abandoned. In their letter of the fifth to the defendants, the plaintiffs say: “If you are of opinion that the cargo is bound to pay any freight, it will be for your interest to give directions that the cargo be not delivered to the shippers or underwriters on the cargo until the freight may be settled. There is a sloop with some flour on board taken from the ship; it is necessary that some orders should be given for discharging the flour.” On the tenth of March, defendants informed plaintiffs that their taking charge of the ship should not prejudice any claim they had on the defendant for freight. The voyage was broken up in consequence of the disaster, and the vessel having been afterwards repaired, at an expense of one hundred and fifty dollars, was sold by the plaintiffs for their own benefit. The cargo was delivered to the insurers thereon; Kermit, the agent of the defendants, knowing of such delivery and making no objection.

Wells and Radcliff, for the plaintiffs, contended that the facts showed that they were entitled to abandon; that it made no difference whether the goods were totally lost, or so damaged as to be worth nothing at their destination; that plaintiffs had cautioned defendants as to the delivery of the cargo to the insurers thereon, until the freight had been secured; and defendants, through their agent, had acquiesced in such delivery. Moreover, the owners of the cargo might have abandoned it to the plaintiffs for the freight at Barcelona: *Luke v. Lyde*, 2 Burr. 886; *Lutwidge v. Grey*, Abbott, 234, 239; *Baillie v. Moudigliani*, Park, 53.

Hoffman and Harison, for the defendants, urged that noth-

ing would prevent a ship from earning freight but an incapacity to prosecute the voyage, or the absolute loss of the cargo by the perils of the sea; that Kermit's authority did not extend to binding the corporation, and that if the owners of the cargo might have abandoned it at Barcelona for the freight, it would then have been substituted for the payment of freight, and plaintiffs would have had no action for a loss of freight.

By Court, KERR, C. J. The only material difference between the special verdict before us, and the case, which was made upon the former trial of this cause, is respecting the extent of the damage to the flour. It is now found that all the flour, except between one hundred and two hundred barrels, became damaged, and wholly unfit to be reshipped for that or any other voyage, and that if the damaged flour had been carried to Barcelona, it would have been worth nothing there, and would have injured the sound flour, and that no prudent person would have taken the cargo as a gift, and carried it, subject to the expense of the freight. But it is also found that the whole cargo was sold at New York, at a loss of only twenty-five or twenty-seven per cent., which was, of course, more than double the amount of the freight.

These facts do not appear to vary in any degree the application of the principles laid down by the court in the former consideration of this cause. When the plaintiffs abandoned, on the fifth of March, they had a cargo in charge worth more than double their freight. The ship was in a condition to be immediately and easily repaired, and in seventeen days she was repaired and ready for sea. If the plaintiffs, instead of abandoning to the defendants, had offered to proceed with the cargo, and the owners of it had refused, they would have made themselves liable for the full freight. If the owners had consented, the plaintiffs would have been bound to proceed, and run the risk (against which risk the defendants had assured by the policy) of losing the freight by the loss of the cargo, in the course of the voyage, or of earning freight by its safe arrival and delivery at the port of destination. How does it appear that freight could not have been earned? For the plaintiffs to abandon without assuming this risk, was unreasonable and inadmissible. It would, no doubt, have suited very well with their convenience to have received the full freight for the voyage, without ever leaving the port of New York, and to have employed the time which that voyage would have consumed, in earning freight on some other. But they cannot be permitted

to enjoy this good fortune, unless they can show clearly that the freight insured was lost, either by the act of the shipper, or by the perils of the sea. Whether it would have been wise or foolish in the shipper, to have sent on the flour, in the condition it was in, was a question not to be put by the plaintiffs. It was none of their concern. The risk of the value of the cargo at the port of delivery lay with the owners of the cargo. All that the plaintiffs had to do, by their contract, was to provide the means to take on the cargo, by repairing their ship, or procuring another.

But it is said that the cargo, if carried on to Barcelona, would not have been worth the freight. This is the import of the special verdict. Here, then, the question arises, whether the plaintiffs would not have had their remedy against the shipper personally, for any deficiency in the freight, or whether the owners could discharge themselves completely by abandoning the damaged cargo to the plaintiffs, after its arrival at Barcelona.

The question has not, hitherto, received any judicial decision in the English courts; and it has been frequently mentioned in this court as a point unsettled. We are, therefore, called to examine the question upon principle, and upon the authority of the marine law of foreign states.

The contract of affreightment, like other contracts of letting to hire, binds the shipper personally, and the lien which the ship-owner has on the goods conveyed, is only an additional security for the freight. This lien is not incompatible with the personal responsibility of the shipper, and does not extinguish it. The consideration for the freight, is the carriage of the article shipped on board; and the state or condition of the article at the end of the voyage has nothing to do with the obligation of the contract. It requires a special agreement to limit the remedy of the carrier for his hire to the goods conveyed. It cannot be deduced from the nature of the undertaking. The ship-owner performs his engagement when he carries and delivers the goods. The condition which was to precede payment, is then fulfilled. The right to payment then becomes absolute, and whether we consider the spirit of this particular contract, or compare it with the common law doctrine of carrying for hire, we cannot discover any principle which makes the carrier an insurer of the goods as to their soundness, any more than he is of the price in the market to which they are carried. If he has conducted himself with fidelity and vigilance in the course of the voyage, he has no

concern with the diminution of their value. It may impair the remedy which his lien afforded, but it cannot affect his personal demand against the shipper. This conclusion appears to be so natural and just, that I cannot perceive any plausible ground upon which it has been questioned or denied. The weight of authority is certainly on this side. The French ordinance of the marine, tit. du Fret, art. 25, is explicit to the point. This code is not only very high evidence of what was then the general usage of trade, but from its comprehensive plan and masterly execution, it has long been respected as a digest of the maritime law of all the commercial nations of Europe. Valin, in his commentary upon this ordinance, calls in question the equity of the rule; but his reasoning, when we apply it to the true construction of the contract, is weak and superficial; and it has been exposed and answered, and the solidity of the rule vindicated, by a superior and more luminous jurist: Valin, tom. 1, 670; Pothier, *Charte Partie*, No. 59.

But though this question has never been settled at Westminster Hall, Mr. Abbott, p. 243, says that the assumed right to abandon deteriorated goods at the port of discharge, is not, in point of practice, claimed in that country, and his opinion is evidently in favor of the rule as established in France. We have, however, the opinion of Lord Mansfield against it, according to the report of the case of *Luke v. Lyde*, and if we were certain of the accuracy of that part of the report, and that the observation was intended to apply the very question before us, we ought to pause even over the *dicta* of so pre-eminent a judge. We cannot, however, bend our convictions to a mere extra-judicial saying, and when this cause was formerly before us, the weight of this *dictum* was greatly diminished by the judicious reflections of one of the judges of this court, who has since been elevated to the bench of the United States. [Judge Livingston.]

The acquiescence of the defendants in the breaking up of the voyage and the abandonment of the freight, have been urged to the court as facts better supported by the special verdict than they were by the case made. There does not, however, appear any material alteration of the cause in this respect, and there is nothing which gives sufficient color for such an inference. The acts of Kermit, the agent of the defendants, relative to the delivery of the cargo to the Commercial Insurance Company, went no further than was requisite to the unloading and repairing of the ship, of which the defendants were also the insurers.

Every act is referable to that object. The assent of the defendants ought to have been found as a positive, substantive fact, if it ever existed. It would be unjust to infer it from acts capable of a different explanation, and which, at most, were but equivocal.

The court are, accordingly, of opinion that judgment must be rendered for the defendants.

Judgment for the defendants.

READE v. COMMERCIAL INSURANCE CO.

[3 JOHNSON, 352.]

DEVIATION.—A vessel was insured from New York to Bordeaux, and had French passengers on board; and the owners instructed the master to proceed through the Sound, so as to avoid the risk of detention by British cruisers then off Sandy Hook. The master accordingly went through the Sound, instead of going through the Narrows, the ordinary and least dangerous route for vessels. This was held to be no deviation.

LIABILITY OF INSURERS TO PAY BOTTOMRY BOND.—A vessel being insured from New York to Bordeaux, was consigned, with a part of the cargo belonging to the owner, to a person at Bordeaux, on whom bills were drawn to the full amount of the goods and freight. The master applied to the consignee there to make necessary repairs for the return voyage, and the consignee made an advance of money, taking a bottomry bond for the amount. It was held that the insurers, under the circumstances of the case, were not bound to pay the bottomry bond, but only for the repairs.

ACTION on a policy of insurance on the ship *Frances Ann*, on a voyage from New York to Bordeaux and back.

The vessel sailed on the voyage insured September 7, 1807, having on board a number of French passengers, and, pursuant to the orders of the owners, went through the Sound to avoid the risk of detention by British cruisers then off Sandy Hook. The passage through the Narrows was that usually taken by vessels bound to sea, and was the more convenient; but it was not shown that leave was ever asked of insurers for vessels to go through the sound.

The ship having suffered damage at sea, it became necessary to repair her at Bordeaux, and the master applied to the consignee, P. Coudere, Jr., who paid for the repairs with his own funds, and took a bottomry bond from the captain, at his own risk, at twenty-five per cent., marine interest. The value of that portion of the cargo which belonged to plaintiffs had been counterbalanced by plaintiffs' drafts on London, which Coudere had

agreed to pay. The master incurred no personal responsibility in repairing the vessel, except that which arose from his execution of the bottomry bond.

On the return of the vessel to New York, the defendants refused to take up the bottomry bond; whereupon she was libeled in the United States district court, and the amount recovered, which plaintiffs paid to prevent a sale of the ship.

A verdict was taken for the plaintiffs, subject to the opinion of the court upon the following questions: 1. Whether there was a deviation? 2. Whether the defendants were liable for the marine interest on the bottomry bond?

Hopkins, for the plaintiffs, as to the first point, contended that the sailing through the sound was prudent and justifiable: 2 Emerig. 58, 59, 60; Marsh. 412; and as to the second, relied upon *Dacosta v. Newnham*, 2 T. R. 407, to show that the bottomry bond was the measure of damages, for which the insurers were liable.

Wells, contra, urged that it should have been left to the master's judgment which passage to have taken, that the insured's undertaking to prescribe the course, discharged the insurers: Marsh. 407; *Middlewood v. Blakes*, 7 T. R. 162. He further contended that the master had no right to borrow on bottomry in places where the owners reside, nor where they have agents or consignees who are bound to furnish the requisite funds on the credit of the owners: Peter's Ad. Dec. 302, 303; and that, in any event, the insured were not liable for the marine interest.

By Court, VAN NESS, J. There are two questions in this cause: 1. Was the going to sea through the Sound, under the circumstances of this case, a deviation? And, 2. Are the defendants liable for the marine interest on the money borrowed on bottomry at Bordeaux?

There are two passages to sea from the port of New York; one by the Sound, and the other by the Narrows. The former has of late years been frequently pursued, but the latter is used in far the greater number of cases, and is the most usual and ordinary course for vessels sailing from the port of New York on a foreign voyage.

In every contract of marine insurance, there is an implied condition on the part of the insured, that the ship shall proceed on her voyage to her destined port, in the shortest, safest, and most usual course. If this be not done, and the ship, without just and reasonable cause, leaves the regular and cus-

tomary tract, it is a deviation, and from that time the policy is at an end, and the insurer is discharged from all subsequent responsibility.

If there were no evidence in this case to justify the departure of the ship from the most usual and ordinary course, we are inclined to think that here would have been a deviation; but under all circumstances, we consider that there was a just and reasonable ground for such departure, though there may not have been an absolute necessity for it.

The ship was bound to a French port, having a number of French passengers on board, some of whom were sent home on account of the French government, and part of her cargo was colonial produce. At the time she sailed, the *Cleopatra*, and other British ships, were off Sandy Hook, who captured several American ships, and there was considerable apprehension on this subject among the merchants. Under these circumstances, the owners were justifiable in instructing the captain to go by the way of the Sound, and there was no occasion to apply to the underwriters for their consent to a measure so obviously the dictate of prudence, and for the benefit of all concerned. It is no deviation to go out of the ordinary track to avoid danger: *Marshall*, 408. That in this case, there was danger, not only of detention, but even of capture and condemnation, cannot reasonably be doubted. To avoid this danger, it was a prudent exercise of the discretion resting with the owners, to direct the master to leave the customary passage to the sea, and to pursue another, not new and unexplored, but occasionally used, and in which there were regular pilots. The owners, in giving these instructions, could have no sinister views; and it is not pretended but that they acted with the most perfect good faith for the benefit of all parties interested, and with the sole view to conduct the ship and cargo by the safest course to her port of destination.

It has been said, that in cases where a departure from the usual course is excusable, for reasons growing out of the circumstances existing at the time, the insured have a right to the opinion of the master, and to the uncontrolled exercise of his discretion. This is true to a certain extent; as where the voyage has been commenced, and when the circumstances which render such a departure expedient, are unknown to the owners, and when, consequently, they could not form so correct an opinion as the master. Such was the case of *Middlewood v. Lakes*, 7 T. R. 162. But when the departure takes place, as in

the present case, where the owner is on the spot, and well acquainted with all the circumstances, and, in all probability, most competent to judge of their urgency and weight, there can be no use, neither is there any reason or necessity for consulting the master, or leaving the course to be pursued to his discretion.

Whether defendants are liable for the marine interest or not, for the money borrowed by the master at Bordeaux, is the next question; and in the consideration of which, it is taken for granted, that the repairs of the vessel were rendered necessary by the injuries she had sustained in the course of her voyage, by the perils within the policy, and for which, consequently, the insured are liable.

The general power of the master to hypothecate the ship abroad, for the purpose of raising money necessary for completing the voyage, is not questioned, but it is objected in this case, that such right does not exist at the port of destination; that there was no necessity for resorting to this mode of raising money; and that, at all events, admitting the right of the master in this case, still it was not so exercised as to subject the insurers to the payment of the marine interest.

The only limitation of the master's right to hypothecate the ship, in case of necessity, is that it shall be exercised abroad, and not in the place where the owners reside. The reasons from which the origin of this right is deduced, seem to apply with as much force to the case where the necessity for exercising it arises at the port of destination, as at any other port into which the vessel may have been driven in distress. The only difference between the two cases is, that in the one, the necessity which justifies the exercise of the right, is more palpable and manifest than in the other. Freight is frequently made payable, and the insured commonly have a correspondent and credit at the port of destination, and while the captain can find resources from either of these, he would not have a right to pledge the ship. But it does not follow, from thence, that if the master does not receive freight, and cannot borrow money upon the credit of the insured, that he may not pledge the ship. The only and important inquiry must necessarily be, were the exigencies of the case such as to render a pledge of the ship indispensable, and that being granted, the right results, of course, wheresoever the vessel may then be. Suppose, in the case of an insurance out and home, and the injury to the vessel happens at the port of delivery, or at sea, when the port

of delivery is the nearest port into which the vessel can put, and that the freight is not payable until the ship's return, and the master is unable to procure money for the necessary repairs, to enable him to complete the voyage in any other way than upon bottomry, what is he to do? One of two things: he must either pledge the ship, or give up the voyage. By doing the one, he may, at a trifling loss to the underwriter, repair the ship and perform the voyage; by doing the other, the underwriter may be subjected to a total loss.

Abbott, Marshall and Park recognize the master's right to borrow money on bottomry in a foreign country, whenever it is essential to the safety of the ship, and the success of the voyage, and the term "foreign country" is used in contradiction to the place of the owner's residence: Marsh. on Insur. 638; Park on Insur. 413, 414; Abbott on Shipping, 118. So, also, are the laws of the Hanse Towns, art. 8, and of Wisbuy, art. 45. See, also, the Marine Ordinance of France, art. 17 and 19, book 2, tit. 1. Upon principle, therefore, as well as authority, we are satisfied that in cases of necessity, and when the master cannot otherwise procure the money, he may borrow it on bottomry, and hypothecate the vessel for the re-payment of it, as well at the port of destination, as at any other foreign port.

But there are circumstances in the present case which ought to induce the court to lean against rendering the insurers liable for the marine interest. The bottomry bond was given to the consignee of the ship, and of the plaintiffs' part of the cargo. The consignee was the person to whom the master alone applied, and upon whom he relied, as he says, for everything; and there is every reason to believe that the necessity of repairs, and of money for that purpose, was made known to the consignee upon the arrival of the ship. Notwithstanding this, he diverted the funds in his hands to other objects, and advanced his own money at an interest of twenty-five per cent.

To render the insurer liable for marine interest, it ought evidently and clearly to appear that there were no other means of raising money than by a bottomry bond.

The conduct of the consignee is not free from all suspicion. If the master had pressed him to make the advances for bills upon the plaintiffs, he might have agreed to accept them. It does not appear, neither can it be fairly inferred from the evidence that the master ever attempted to obtain the money on the credit of the owners; but, on the contrary, it appears that he at once agreed either to give the bills or the bottomry bond;

and it is even doubtful whether the master had not himself the election to give the one or the other. The consignee did not advance the money exclusively on the engagement to give a bottomry. It was the duty of the master to have exhausted all other means of raising the money, before he could legally subject the insurer to the payment of an extravagant marine interest. He did not do so, and it is questionable whether this bond was valid, even as against the owners; but we are clearly of opinion that the insurers cannot be affected by it.

The opinion of the court, therefore, is that the marine interest must be deducted from the amount of the verdict, and that the plaintiffs must have judgment for the residue only.

THOMPSON, J., not having heard the argument in the cause, gave no opinion.

Judgment for the plaintiffs.

JACKSON v. HUDSON.

[3 JOHNSON, 375.]

POSSESSION BY INDIANS NOT ADVERSE.—A possession by native Indians, existing as an independent nation, is not such an adverse possession as will render void alienations by patentees to whom the lands were granted by the state, and cannot be set up against the validity of the patent, or conveyances under it.

DEFENDANT'S TITLE IN EJECTMENT.—Where the defendant in ejectment sets up an outstanding title, it must be a present subsisting and operative title, otherwise it will be presumed that such title in a stranger has been extinguished.

INTERPRETATION OF DEED.—Where a deed may inure in different ways, the grantee shall have his election which way to take it; and an exception in a deed is always to be taken most favorably for the grantee.

EJECTMENT. The facts appear from the opinion. The case came before the court on a motion to set aside the verdict, giving the plaintiff three-eighths of the premises in question.

Cady and Van Vechten, for the defendant, in support of the motion.

Hildreth, contra.

By Court, KENT, C. J. The lessors of the plaintiff have made out the following paper title to the premises:

1. A patent from government, in the year 1731, for eight thousand acres of land, and which included the Conajohary Castle tract, of which the premises in question are a part;

2. A release from one of the four patentees, in the year 1734, to Philip Livingston, another of the patentees, for his one-fourth part of the tract. This release invested Livingston with a moiety of the lands;

3. The will of Livingston, in the year 1748, by which he devised his estate in the patent to his eight children, in fee;

4. A deed from the devisees, in the year 1761, to Jellis Fonda and George Klock, for a moiety of the same patent, excepting one thousand acres before conveyed to David Schuyler;

5. A deed from the heirs of Van Horne, another of the patentees, in the same year, 1761, to Fonda and Klock, for a fourth part of the patent, excepting five hundred acres before conveyed to David Schuyler.

These several conveyances invested George Klock, the father of the lessors of the plaintiff, with the title to an undivided fourth part and an undivided eighth part of lot No. 2, in the Conajohary Castle tract (being the premises in dispute), provided the portions of land previously conveyed to Schuyler are located in some other part of the tract, and the fourth and the eighth parts amount to three-eighths of the premises, or the quantity of land recovered by the verdict. The lessors of the plaintiff were proved to be the heirs at law of Klock; and this title, so deduced, is *prima facie* evidence of a good title to the premises, to the extent of the recovery. We are next to examine the several objections which the defendant has raised to its validity.

He has not set up any title in himself under the patent, except it be a deed from the executors of Fonda, in the year 1792, for a part of the premises, and a deed from C. P. Yates, in the same year, for the residue of the premises. These deeds were given only seven years before the commencement of the present suit. The deed from Yates conveyed no title, because there is no evidence that he had any title, or that he ever was in possession; and the deed from the executors of Fonda (admitting that they were authorized to convey) could have operated only on the undivided share of their testator in the lot in question, as the release from Klock to Fonda, in the year 1767, was for another part of the castle tract.

The first objection raised to the plaintiff's title is, that the Mohawk Indians of the Conajohary Castle were in possession of the premises, as well as of the whole Conajohary Castle tract, in the year 1761, and possessed it as their own, and consequently, that here was an adverse possession, which rendered the deed of 1761 inoperative.

It appeared that the Mohawk Indians had the exclusive possession of the Conajohary Castle tract, not only in 1761, but as far back as the memory of witnesses could reach, and one of the witnesses who testified to this effect was ninety years of age. The Indians must, then, have been in possession of this tract when the letters patent issued, in 1731; but this possession can never be urged against the validity of the patent, or of any of the subsequent conveyances under it. The defendant did not object to the legality of the patent, for he introduced it; and yet it must be apparent, that if the possession of the Indians was sufficient to destroy the operation of the deeds in 1761, it would be equally effectual to destroy the grant from government in 1731. Such a suggestion, however, is inadmissible. The policy, or the abstract right of granting lands in the possession of the native Indians, without their previous consent, as original lords of the soil, is a political question with which we have at present nothing to do. It cannot arise or be discussed in a contest between two of our own citizens, neither of whom deduces any title from the Indians. What would be the effect of an Indian possession or title, in opposition to the grant under the patent, if they were to be brought into collision, is not a question before us. No such title is set up, and the Mohawk Indians have, from the time of the American war, ceased to claim or occupy the lands. The most decent presumption is, that the Conajohary Castle lands had been previously purchased by government. At any rate, no Indian claim exists, nor does it appear that any controversy with the Indians, as to title, has ever existed. The competency of government to grant cannot be called in question. As to the subsequent alienations under the patent, the doctrine of the common law, rendering void the sale of lands while they are in adverse possession, does not apply. The evil of maintenance could not exist in the case. That evil consisted in selling contentions and lawsuits, "whereby right might be trodden down, and the weak oppressed." But the Mohawk Indians of the Conajohary, or upper Mohawk Castle, existed and occupied the lands in question, as part of an independent tribe. This tribe inhabited what was formerly called the upper and lower Mohawk Castles, and was never held amenable to the jurisdiction of our courts of justice. They possessed their lands in common as belonging to the community, and they continued to be recognized in their independent or national character by the colony government, long after the date of the patent, in 1731,

and even down to the time of the American war. This historical fact could be abundantly proved, if requisite, by a reference to the public documents of the country; but it may here be assumed as a fact of public notoriety. The conveyance from one individual to another, of a title to these Indian castles, was not, then, a conveyance of a right in action, since no action could have been sustained against the Mohawk tribe.

The next point raised to destroy the effect of the plaintiff's title, consisted in the allegation of an existing title out of the lessors of the plaintiff, and which was supposed to reside in these same Indians of the Conajohary Castle, or in some part of them. This Indian title was deduced from the release of Livingston in the year 1763, to three Indians by name, in trust for them, and all the Indians of the Conajohary Castle. Several objections occur to defeat the force of this objection. If a defendant set up an outstanding title existing in a stranger, it must be a present subsisting title; it must be one that is living and operative, otherwise the presumption will be that it has become extinguished. Considering the nature of this obstacle, raised by a defendant who has no title, to defeat a plaintiff who shows a good title, the presumption as between them of an extinguishment of the outstanding title ought to be pretty liberally indulged. It has accordingly been held that the production of an old outstanding lease was not sufficient without showing a possession under it within twenty years, and that a mortgage deed would not be evidence of a subsisting title, if the mortgagee never entered, and no interest had been paid within twenty years: Buller's N. P. 110.

In the present case there is good ground to presume an extinction of the Mohawks, as a separate tribe. From the time of the American war down to the trial, we hear nothing of the three trustees; or of their *cestui que trusts*. No person during all that lapse of time has appeared under that release, either as a party or a reversioner, to deduce any title or claim founded upon it. The presumption is, therefore, irresistible that it is no longer a subsisting title. But a still more decisive objection to the release is, that it does not appear ever to have been executed by Klock, notwithstanding his name is mentioned in the body of it; and no subsisting title, under the patent, is shown to have existed at that time in the other grantors. The possession of the Indians from 1763 to the American war, was not of itself sufficient to justify an inference of a title derived from the releasors, because the Indian possession was merely a

continuation of that which had existed from time immemorial. Nor can the presumption of a deed to the Indians be deduced from the note or memorandum in the field-book of 1764, since the presumption is rebutted by the fact that in twelve or fourteen years after that time, the Indians abandoned the premises, and have never since returned. But it is evident that the field-book memorandum alluded to the release of 1763, and it demonstrates that George Klock never was a party to the release, for it specifies the names of the actual releasors. There was, then, never any outstanding title as against him; and the other parties were, for aught that appears, strangers, who had no right to give a release; and if any title passed, it is not now a subsisting one, since the Mohawk Indians of the Conajohary Castle have long since disappeared from the face of the country. *Etiam periere ruinae.*

Another objection to the plaintiff's title is deduced from the exception in the deeds of 1761, of the one thousand and of the five hundred acres, previously conveyed to Schuyler. In what part of the tract, covered by the patent, these two portions of land had been previously located, does not appear. There was land sufficient to supply them without touching any part of the premises, and as the deeds were not explicit, Klock, the grantee, was left at liberty to locate these excepted tracts in whatever part of the patent he pleased, as against every other person but Schuyler. Where a deed may inure in different ways, the grantee shall have his election which way to take it. An exception in a deed is always to be taken most favorably for the grantee; and if it be not set down, and described with certainty, the grantee shall have the benefit of the defect.

There is, then, no weight in this objection, and upon a full consideration of the case, the court are of opinion that the motion on the part of the defendant for a new trial, must be denied.

SPENCER, J., having been formerly concerned as counsel in the cause, declined giving an opinion.

Rule refused.

JACKSON v. MYERS.

[3 JOHNSON, 383.]

AGREEMENT TO CONVEY NOT A DEED.—An instrument in the form of articles of agreement to convey, and concluding with a penalty for non-performance, though containing words of bargain and sale; or a conveyance in *presenti* to a party and his heirs, is no more than an agreement to convey.

INTENT TO CONTROL.—The intent, when apparent and not repugnant to any rule of law, will control technical terms; for the intent, and not the words, is the essence of every agreement.

WHEN LIFE ESTATE CREATED.—A bargain and sale of land to A., “to hold the same for A. in trust for B. and C., their respective heirs and assigns forever in fee-simple,” creates only a life estate in A., and at his death, the legal estate reverts to the heirs of the grantor, and B. and C. can resort only to a court of equity to have the trust enforced.

EVIDENCE OF POSSESSION IN EJECTMENT.—When the plaintiff in ejectment claims to recover on the ground of prior possession, that possession must be clearly and unequivocally proved. The payment of taxes and the execution of partition deeds are not evidence of an actual possession, though they may show a claim of title.

EJECTMENT. The plaintiff claimed the premises as the lessee of the Ludlows, who rely upon a possession dating back to 1776. The defendant held as the legal representative of Van Kleeck, whose possession, defendant insists, was prior to that of the Ludlows, and had been continued to the present time. The lines of succession more clearly appear from the opinion.

Plaintiff also claimed by virtue of certain articles of agreement, executed March 12, 1779, between Baltus Van Kleeck, the original possessor of the premises, and George Ludlow, in which Baltus, for the consideration thereafter mentioned, granted, bargained, sold and conveyed the premises to George Ludlow, to hold in trust for William and Gabriel Ludlow, their heirs and assigns forever; and Baltus covenanted to make a good and sufficient deed by the first of May following; in consideration whereof, George Ludlow covenanted that he and William, or one of them, would assign certain bonds to Baltus, to the amount of one thousand seven hundred pounds; and the parties mutually agreed to secure the said lands and bonds to be severally conveyed and assigned, against all confiscations, etc. For the true performance of the grants and covenants, each party bound himself to the other in the penal sum of five hundred pounds.

A verdict was found for the plaintiff, whereupon defendant moved for a new trial.

J. Tallmadge and Emott, for the defendants.

Harison and J. Radcliff, for the plaintiff.

By Court, KENT, C. J. The lessors of the plaintiff must recover in this case, either on the strength of the deed of the twelfth of March, 1779, or of their possession of the premises prior to the entry of the defendant. They have shown no title but what is to be deduced from one or other of these sources:

1. The deed produced does not appear to be sufficient to give them the title in question. Considering it in all its parts, it is to be taken as a mere article of agreement, and not a conveyance of an estate. It purports, by its formal commencement, to be only articles of agreement, and it concludes by binding the parties to each other, in a penalty for the performance of the grants and covenants in the deed. It is well understood, that as early as the year 1779, the form of conveyance in this state was by lease and release, and that this had been the universal practice during the colonial government, a practice which continued until the abolition of the British statutes in the year 1788. It was the generally received opinion at that day, that a bargain and sale required enrollment, and this usage and opinion (whether correct or not, is perfectly immaterial), is a strong *indicium* of the understanding of the parties to this deed, that no estate was intended to be conveyed. There was no consideration paid or acknowledged, but only an agreement that bonds should thereafter be assigned, and there was a mutual covenant to secure the lands and bonds "to be conveyed and assigned" from forfeiture and confiscation. After this, who can doubt of the intent? The intent, when apparent and not repugnant to any rule of law, will control technical terms, for the intent and not the words, is the essence of every agreement. In the exposition of deeds, the construction must be upon the view and comparison of the whole instrument, and with an endeavor to give every part of it meaning and effect. The rule as to leases, according to Lord Chief Baron Gilbert (Bacon, tit. Leases, etc.) is, that though the most proper form of words be used to describe and pass a present lease for years, yet, if upon the whole deed there appears no such intent, and that it is only preparatory and relative to a future lease to be made, the law will rather do violence to the words, than break through the manifest intent. The case of *Sturgion v. Dorothy*, Noy, 128, is directly to this point. There was in that case an article of agreement to lease a place for fifty years, and the words were in the present tense, and with the form of an immediate demise; but as the intent from another part of the same paper appeared to be, that the agreement should only be executory, the court ruled that it was not a lease, but only an agreement for a lease. The like decision was made in the modern cases of *Goodtitle v. Way*, and of *Doe v. Clare*, 1 T. R. 735; 2 Id. 739, and in one of those cases the decision in Noy was recognized as law. The same rule of con-

struction has been applied to cases where a life estate was in question. It was determined in *Doe v. Smith*, 6 East, 530, that where the whole instrument imported that something ulterior to the agreement was to be done by way of a regular lease, it showed the intent to be, notwithstanding the words of the demise appeared to be *in presenti*, that the writing was only to operate as an agreement for a lease, and not as the lease itself. But the case of *Foster v. Foster*, 1 Lev. 55, 1 Sid. 82, is much more analogous than any which has been mentioned. The deed in that case respected an estate in fee, and began with the like form of commencement as the deed in the present case, and used the like words, denoting an immediate conveyance; but the court held, that the articles did not raise any use, but rested only in covenant; that it was only an agreement preparatory to a further assurance, and that no fee passed.

These cases sufficiently establish the rule of construction, that though a deed may in one part use the formal and apt words of conveyance, yet if, from other parts of the instrument taken and compared together, it appears that a mere agreement for a conveyance was all that was intended, the intent shall prevail.

If, however, we were to give this article of agreement the force and effect of a technical bargain and sale, it is evident that only a life estate was conveyed to George Ludlow; and that the *cestui que trusts*, if they had any remedy after the death of Ludlow, to enforce the trust, were under the necessity of resorting to a court of equity to obtain it. The legal estate reverted back to the heirs of Baltus Van Kleeck. The reversion in fee was clearly in the bargainor, for want of words of inheritance. Whenever the use limited by a deed expires or cannot vest, it returns back to him who raised it, and a use upon a bargain and sale cannot be limited to any other person than the bargainee. He cannot be seised of the land to any other use than his own. The trust created in this case was exclusively within the cognizance of the court of chancery. It is, therefore, a most obvious conclusion, that the paper title set up by the lessors must fall to the ground.

2. The next point in the case is, whether the lessors made out a title by possession. It appears that Baltus Van Kleeck was the original owner of the premises. He acquired a title by descent cast from his father Lawrence, and he was in the peaceable possession at the commencement of the American war. The legal title must still reside in his heirs, except so far as it may be deemed to be lost or weakened by the possession of the

Ludlow family. After a careful examination of the facts, I cannot perceive that the lessors of the plaintiff have made out a right of possession. William Ludlow entered in the year 1776 as a tenant under Baltus Van Kleeck, and he remained there for a year, and then left the premises. McDougale succeeded him, and said that he was put in possession by the commissioners of sequestration. Here was still a possession continued under the title of Van Kleeck, by public officers, assuming the possession as belonging to Van Kleeck, who had withdrawn within the British lines. McDougale was succeeded by Lewis or Wood, and he by Chamberlain, who was in possession in 1784 and 1785, and paid rent to one of the executors of Baltus Van Kleeck. In 1785, the executors of Baltus sold the premises at auction, and Carman purchased and took possession under that title, and held the premises until the year 1794, when we first hear of any recognition of a title in the Ludlow family, and it is from that time only that any title by possession can be deduced. The fact mentioned by one of the witnesses for the plaintiffs, that Lewis, who was in possession after McDougale, said that he held under the Ludlows cannot have much weight. It is probable there must have been some mistake on this point, as the possession and title of Van Kleeck seem afterwards to have been regularly continued down and acknowledged until the controversy which took place with Carman, in 1794. The possession of the Ludlows since the year 1794 was equivocal, and not sufficient to support any title founded on possession alone. About the time that Carman acknowledged their title, he quitted the possession, and from that time until the entry of the defendant, the premises were left vacant and uninclosed. The payment of taxes and the partitions made by the Ludlow family, were not evidence of actual possession, though they may have been of a claim of title. The lessors of the plaintiff, therefore, failed to support a right founded on possession, and the defendant showed an outstanding title in the legal representatives of Baltus Van Kleeck.

The court are, accordingly, of opinion, that the verdict was against evidence, and ought to be set aside.

VAN NESS, J., having been formerly concerned as counsel, gave no opinion.

THOMPSON, J., not having heard the argument, gave no opinion.

Rule granted.

BAILEY v. OGDEN.

[3 JOHNSON, 299.]

MEMORANDUM REQUIRED BY STATUTE OF FRAUDS. — The form of the memorandum of the agreement required by the statute of frauds is not material, but it must state the contract with reasonable certainty so that the substance of it may be understood from the writing itself without having recourse to parol proof. An entry made by the vendor in his book of sales, of the name of the buyer and the terms of the contract of sale, which was read to the agent of the vendee, making the purchase, and assented to by him, was held an insufficient memorandum within the statute of frauds, it not being signed by the party to be charged, or by his agent.

DELIVERY REQUIRED BY THE STATUTE. — An actual delivery of the goods, or a part of them, is not always required by the statute of frauds, but a virtual or constructive delivery may be sufficient. Those circumstances which ought to be held tantamount to an actual delivery, ought, however, to be so strong and unequivocal, as to leave no doubt of the intent of the parties. An agreement with the vendor about the storage of the goods, and the delivery by him of the import entry to the agent of the vendee, were held not to be sufficiently certain to amount to a constructive delivery, or to afford an *indiciu*m of ownership.

ASSUMPSIT. The declaration stated a special agreement: That Huguet, defendants' broker, agreed to purchase of plaintiffs a quantity of sugar, and give therefor promissory notes with approved indorsers, and the debentures for the sugar, to be received in part payment; that the sugar was to remain with the plaintiffs, for the defendants, at a certain storage per month until removed. The declaration averred delivery, demand of the notes and breach.

At the trial the deposition of plaintiffs' clerk was read; from which the facts regarding the sale were sworn to, and also that a memorandum of the sale was made by one of the plaintiffs in their books, and the entry read to Huguet, who approved the same. The memorandum was as follows:

“DECEMBER 14.

“Sold Huguet, for J. Ogden & Co., notes with approved indorsers, — boxes, white, — do., brown Havana sugars, at twelve and a half for brown, and sixteen and a quarter for white, payable at sixty and ninety days; debentures we will receive in part payment.”

The deposition also stated that Huguet wanted plaintiffs to take the notes without an indorser, but they refused; and that Huguet, at his request, was furnished with a minute of the import entries, to obtain the drawback on the sugar. This

memorandum-book was destroyed by fire on the eighteenth of December, 1804.

Plaintiffs' bookkeeper and another clerk also testified to the same facts; as well that no mention was made in any of the conversations between Huguet and the plaintiffs, whether the defendants were at liberty to remove the sugar before the delivering of the notes; nor as to the person who was to be the indorser.

Several merchants testified that it was customary to deliver goods before receiving notes for their payment, and that it was not usual to inquire who was to be the indorser; that it was not usual to stipulate for storage until the bargain was complete, and that they never heard of an instance of the delivery of the minute of the import entry of goods, until after the goods were sold.

Huguet was examined on behalf of defendants, and testified that he told plaintiffs that defendants would satisfy them as to the indorser, but that it was not his order to do so; and that when shown the memorandum by plaintiff, he said it was right; but in respect to the indorser, that J. Ogden will be in town on Monday, and you will fix it with him; that he made no entry of the matter until he knew whether Ogden would accept the terms, but merely kept a memorandum in pencil; that Ogden refused to give an indorser; that he said nothing about removing the sugar, nor made any agreement for its storage; and that he did not consider the bargain concluded if Ogden did not agree to give an indorser. Defendants' clerk testified, that Huguet had no authority to bind defendants to give an indorser; that Ogden had never given an indorser; and that Ogden denied to one of the plaintiffs having made the purchase.

Defendants further proved the delivery to them, by plaintiffs, on the twenty-fifth December, 1804, a bill of parcels of the sugar, and that on the twenty-ninth, plaintiffs demanded notes without an indorser.

The jury found for the defendants, and a motion was made for a new trial.

C. J. Bogert and Pendleton, for the plaintiffs, urged that there was sufficient evidence of a contract between the parties; that Huguet was the agent of defendants, and was clothed with all the powers relative to the object of the agency; and plaintiffs had nothing to do with his particular instructions of which they were not advised: *Fenn v. Harrison*, 3 T. R. 757; 1 Pothier on Obligations, 45, 1, ch. 1, sec. 1, art. 5, sec. 4; *Neal v. Ewing*, 1

Esp. Ca. 61; 3 Id. 64. The agreement to let the goods remain in plaintiffs' store on storage, was sufficient delivery to take the case out of the statute of frauds: *Cowp. 294; 1 Caines, 46; 1 East, 94; Hollingsworth v. Napier, 3 Cai. 182 (2 Am. Dec. 268).* That there had been a memorandum in writing to which Huguet assented, and this would bring the case within the statute; it was not necessary that both parties should sign: *Roget v. Clapp, 2 Caines, 117; and writing is equivalent to signing: Saunderson v. Jackson, 2 B. & P. 238.*

Hoffman and T. A. Emmett, contra. The indorsed notes must be understood as having approved indorsements, and this was a condition precedent to delivery; there was no actual or constructive delivery of the sugar, as in the case of the delivery of a key of a warehouse, where effectual means are given to the vendee to take possession of the subject: *Noble v. Smith, 2 Johnson, 52 (ante, 399).* The cases of *Chaplin v. Rogers, 1 East, 192; Hammond v. Anderson, 1 B. & P. 69,* were decided on the ground that a part of the goods were actually delivered. Where constructive delivery is claimed, it must be clear, explicit and unequivocal, and with the avowed intention to transfer the possession of the goods. The agreement about the storage could not amount to a virtual delivery, for nothing was to be paid until the expiration of the month. Where a preliminary act of weighing was necessary, the weight must be ascertained before delivery, so as to vest the property: *Hanson v. Meyer, 6 T. R. 615.* There was no memorandum in this case sufficient to satisfy the statute; the bare assent of the party to be charged cannot be equivalent to a signing. The agent has exceeded his authority; he had only a special authority, which he has not pursued: *Patty v. Carswell, 2 Johnson, 48.*

By Court, KENT, C. J. This cause depends upon the decision of these two general questions:

1. Was there a note or memorandum in writing binding upon the defendants, within the meaning of the statute of frauds? If not, then,

2. Was there a delivery of the sugar, so as to change the property, and throw the risk of the subsequent loss upon the defendants?

1. The only memoranda which were made relative to the transaction were an entry of the sale of the sugar made by one of the plaintiffs in their memorandum-book, immediately after the alleged sale, and the minute made with the pencil of Huguet

in his pocket memorandum-book. The entry of the plaintiffs made and retained by them, was not binding upon the defendants, because the statute requires the note or memorandum to be signed by the party to be charged. The numerous cases admitting an agreement to be valid within the statute, if signed by one party only, are all of them cases in which the agreement was signed by the party against whom the performance was sought. Some of the cases arose under the fourth and others under the seventeenth section of the English statute; but the words are, in this respect, similar, and require the same construction: 2 Cha. Ca. 164; 1 Powell on Contracts, 286; 5 Viner, 527, pl. 17; 1 Vesey, 82; 3 Bro. C. C. 162; 3 Atk. 503; 6 East, 807; 7 Vesey, Jr., 265; 9 Vesey, Jr., 234, 351; 1 Esp. Cas. 190; *Ballow v. Walker*, in this court, January term, 1802; 2 Caines, 120. It has, however, been said that there would be a want of mutuality, if the plaintiffs in this case were bound by their entry, and the defendants should not be. The same difficulty has occurred in other cases, and Lord Redesdale felt it so strongly that he observed, *Lawrenson v. Butler*, 1 Schoales and Lefroy, 20, that to enforce every agreement signed by one party only, against such party, would be to make the statute really a statute of fraud, and that there was no late case in which one party only was bound by the agreement, where equity had decreed performance, though he admitted the import of the statute to be, that no agreement should be in force, but when signed by the party to be charged. He further intimated that as no man signed an agreement but under a supposition that the other party was bound as well as himself; if the other party was not bound, he signed it under a mistake, which might be a ground for relief in equity. Whether the plaintiff, in the present case, were bound at law by their memorandum, or, if bound, whether they might have relief in equity, are questions not before us, and concerning which we are not now to inquire. It is sufficient to say that the defendants were not bound by any note or memorandum in writing of the contract, unless the same was signed by them, or their authorized agent. Huguet was in this instance their agent to make the purchase, and any memorandum made by him respecting the purchase would operate as a memorandum made by the defendants. But the memorandum which he made was too vague and indefinite to be a compliance with the statute. The form of the memorandum cannot be material, but it must state the contract with reasonable certainty, so that the substance of it can be made

to appear, and be understood from the writing itself, without having recourse to parol proof. This is the meaning and substance of the statute, and without which the beneficial ends of it would be entirely defeated: *Prec. in Cha.* 560; 3 *Atk.* 503; 1 *Vesey, Jr.*, 333. The memorandum of Huguet is absolutely unintelligible. It has not the essentials of the contract, or memorandum of a contract. No person can ascertain from it which of the parties was seller, and which was buyer, nor whether there was any actual sale between them, nor what specific article was the object of the sale, or in what quantity, or what was the price. A memorandum much more intelligible than this, and defective only in one essential point, capable of full explanation by a witness, was lately rejected by the court of C. B., in England, on the same ground: *Champton v. Plummer*, 1 *Bos. & Pul. New Rep.* 252.

There was, then, no note or memorandum in writing which took the present contract out of the statute of frauds, as far, at least, as it respected the defendants.

2. The next question then is, whether here was a delivery of the goods, or of any part, so as to take the case out of the statute. The words of it are, that "the buyer must accept part of the goods sold, and actually receive the same." But, notwithstanding this strong language of the statute, it has become a settled construction, that actual delivery, in the popular sense of the words is not, in all cases, requisite; but a virtual delivery will, in some instances, be equally effectual. A delivery may be presumed or inferred from circumstances, and the doctrine on this subject was correctly laid down in this case, in the charge given by the judge to the jury: 2 *Esp. Cas.* 598; *Roberts on Frauds*, 174 to 183; 1 *East*, 192; 2 *Caines*, 44; 2 *Johnson*, 16. Whether here was a delivery and acceptance, was a fact properly submitted to the jury; and assuming the competency of Huguet as a witness, the jury were well authorized to draw their conclusions in favor of the defendants. An objection was made to him on the ground of interest, but I think the objection was properly overruled. If he exceeded his powers, he stood indifferent between the parties, as he would, at all events, be liable to the losing party, whichever it might be, for the injury done by such excess; and if he did not exceed his power, he was liable to neither: 7 *T. R.* 480. According to Huguet's testimony, the bargain and sale was never consummated, for not only the person who was to be the indorser, but whether the defendants would or would not give an indorser or

surety for the payment, were circumstances attending the contract, left open until the return of one of the defendants from Philadelphia. Here was then, in the meantime, the *locus penitentiae*, and the contract could not be said to be fixed. The witnesses, undoubtedly, differed as to the conversations which passed between the parties; but the jury were the sole judges to whom the greater degree of credibility was due, and it is to be recollected that it was a special jury of merchants. We are not dissatisfied with their verdict upon this ground. Here was no actual delivery, nor an attempt at any symbolical delivery. There was no specific designation of the goods, by marking them, or otherwise; no delivery of the key of the store in which they were lodged. They were left in the actual possession and dominion of the plaintiffs, and under the same apparent ownership as before. If the conversations about storage, and taking a minute of the import entries, would, in such cases, amount to an actual delivery, and be deemed a substitute for the note or memorandum in writing, it appears to me that the statute of frauds would, in a great degree, become useless, and might be set aside as a dead letter. We do not wish to shake any of the cases in which the actual delivery required by the statute has been dispensed with, but those cases have gone far enough; our leaning should be towards the plain meaning of the statute. The circumstances which are to be tantamount to an actual delivery should be very strong and unequivocal, so as to take away all doubt as to the intent and understanding of the parties. The agreement about storage might have been conditional, and depending upon the final completion of the contract, as to the giving of the notes with a competent indorser; and the taking of the minute of the import entry, was at least but an equivocal act. It was not an *indicium* of ownership. Any person might have taken the same paper for his own information or convenience. But if Hugnet was to be believed (and his character was well supported, and his testimony corroborated by that of Lyde), there was no delivery or acceptance of the sugar, and the bargain was left incomplete at the time of the loss. The court are of opinion, therefore, that the motion on the part of the plaintiffs for a new trial must be denied.

THOMPSON, J., not having heard the argument in the cause, gave no opinion.

Rule refused.

This is regarded as a leading case on the statute of frauds, and has been frequently cited in the New York and other courts. In New York it is cited in *Justice v. Lang*, 42 N. Y. 503; *Blanchard v. Trim*, 38 Id. 227; *Dykers v. Townsend*, 24 Id. 59; *Shindler v. Houston*, 1 Id. 272; *Calkins v. Falk*, 39 Barb. 622; *First Bap. Church v. Bigelow*, 16 Wend. 31; *Outwater v. Dodge*, 6 Id. 401; *Peltier v. Collins*, 3 Id. 465; *Abeel v. Radcliff*, 13 Johns. 301; *Fisher v. Fields*, 10 Id. 501. See, citing it elsewhere, *Cobb v. Haskell*, 14 Me. 306; *Crooker v. Appleton*, 25 Id. 135; *O'Donnell v. Leeman*, 43 Id. 160; *Hawkins v. Chace*, 19 Pick. 504; *Winslow v. Winslow*, 24 Pa. St. 16; *Blair v. Snodgrass*, 1 Sued. 25; *Laird v. Boyle*, 2 Wis. 434.

BARON v. ABEEL.

[3 JOHNSON, 481.]

RECOVERY OF MESNE PROFITS AFTER EJECTMENT.—After a recovery in ejectment by default, against the casual ejector, the lessor of the plaintiff may maintain trespass for the mesne profits against the tenant, and may recover costs in the action of ejectment; and the defendant cannot offer any evidence against the demands of the plaintiff, which he could have set up in the original action.

TRESPASS for mesne profits. The plaintiff produced in evidence the record of a judgment obtained against the casual ejector in an action of ejectment, by default. Defendant offered to prove, in order to defeat the right to recover mesne profits and costs in the ejectment suit, that prior to the commencement of the action in ejectment, defendant surrendered the premises to the plaintiff, who accepted the same, and that at the time the declaration in that action was served, defendant was not in possession of the premises, nor had been since the surrender to the plaintiff. This evidence was rejected, and the jury directed to find for the plaintiff, and to allow the costs in the original action of ejectment. A verdict was found accordingly, and a motion for a new trial made by defendant, on the grounds of the rejection of the evidence offered, and misdirection of the judge.

Fool, for the defendant, contended that he was entitled to give anything in evidence in mitigation of damages, though he could not dispute plaintiff's title; that the possession having been delivered, plaintiff could not maintain this action.

Weston, contra, urged that the record in the former action was conclusive; that this action was consequential to a recovery in the other, and entitled the plaintiff to costs and mesne profits: 2 John. 366; 3 Wils. 118; 2 Burr. 669.

By Court, VAN NESS, J. [SPENCER, J., *hesitante*.] The service

of a declaration in ejectment, on the tenant in possession, is considered as much the commencement of the suit as the service of a *capias ad respondendum* in personal actions. The lessor of the plaintiff and the tenant are the real and substantial parties: *Aslin v. Parkin*, 2 Burr, 665; *Van Alen v. Rogers*, 1 Johns. Cases, 288 (1 Am. Dec. 118); *Goodtitle v. Tombs*, 3 Wils. 118. Upon filing an affidavit of the service of the declaration, and entering the common rule, the tenant, if he means to make a defense, is bound to appear, and if he omits to do so, judgment by default, in effect, is rendered against him, because he may be turned out of possession, and because he is liable for the costs in an action for the mesne profits. The effect of a judgment in ejectment, whether by default or otherwise, upon the rights of the parties, is substantially the same as in personal actions. The form of the proceedings is different, but after judgment the legal consequences are essentially the same. One of these consequences is, that the lessor has a right to bring an action for the mesne profits, for the double purpose of obtaining compensation for the use of the land, and recovering the costs of the ejectment. In the action for mesne profits, the defendant is precluded from setting up any defense of which he might have availed himself in the original action of ejectment. It has been said that there is a difference, in this respect, between a judgment by default and a judgment after verdict; but it has been settled otherwise.

In the case of *Aslin v. Parkin*, Lord Mansfield, in delivering the opinion of the court, says: "There is no distinction between a judgment in ejectment upon a verdict and a judgment by default. In the first case the right of the plaintiff is tried and determined; in the last case it is confessed."

Again, in *Goodtitle v. Tombs*, where the question was, whether one tenant in common could maintain this action against the other, after a recovery in ejectment by default, Wilmot, C. J., said: "I consider the recovery in ejectment by default, or after verdict, as the same thing;" and Gould, J., says: "The action for the mesne profits follows the ejectment as a necessary consequence; and in this case, the judgment by default is of the very same effect as if it had been after verdict. The court will intend everything possible against the defendant." These cases, especially the latter, are directly in point.

The defense relied upon in this suit would have been a good bar to the recovery in the action of ejectment, and to permit the defendant to set it up here would be to try the plaintiff's

right to recover in the ejectment. By suffering a judgment to go by default, the defendant has admitted himself to be in possession; and it is now too late for him to controvert that fact. There is no greater hardship in this case than in every other, where the defendant suffers a judgment to be entered against him by neglecting to appear and defend the suit. The evidence offered was, therefore, properly excluded by the judge, and as the plaintiff claimed only nominal damages for the mesne profits, he was entitled to recover that, and the costs in the action of ejectment.

A question was made on the argument, as to the plaintiff's right to recover the costs under the declaration in this cause; but as the pleadings are not set forth in the case, we are unable to give any opinion respecting it. The defendant must take nothing by his motion.

Judgment for the plaintiff.

JACKSON v. ALEXANDER.

[8 JOHNSON, 424.]

OPERATIVE WORDS IN DEED.—The words “for value received” in a deed, import a sufficient consideration to raise a use in the bargainee under the statute of uses; and the words “make over and grant,” are sufficiently operative to convey lands by way of a use.

EJECTMENT. Plaintiff produced in evidence an exemplification of a patent dated July 8, 1790, granting the lot in question to Joseph Brown, for his military services, and a writing executed by Brown in favor of plaintiff's lessors in the following words: “For value received of Daniel Hudson & Co., I hereby make over and grant for myself, my heirs and executors, unto the said Daniel Hudson & Co., his heirs and assigns, my right and claim on the public for six hundred acres of land. Witness my hand and seal, this seventh day of May, 1784.”

“JOSEPH BROWN. [L.S.]

“In presence of SOLOMON COURES, JOSEPH DOLSON.”

A verdict was taken for the plaintiff, subject to the opinion of the court, whether this writing was a sufficient conveyance of the premises. The cause was submitted without argument.

SPENCER, J. There was no proof of a payment, or security given for the payment, of any consideration by Hudson to Brown; and the question is, whether the instrument stated in

the case conveyed the land to Hudson. In my opinion it did not. This instrument cannot have any operation, unless as a bargain and sale, under the statute of uses. In *Mildmay's case*, 1 Coke, 176, this point was decided, and it was held: "That a use cannot be raised by any covenant or proviso, or by any bargain and sale, upon a general consideration, and, therefore, if a man, by deed indented and enrolled, according to the statute, for divers good considerations, bargains and sells his lands to another and his heirs, *nihil operatur inde*, for no use shall be raised on such good consideration, for it doth not appear to the court that the bargainer hath *quid pro quo*, and the court ought to judge whether the consideration be sufficient, or not; and that cannot be when it is alleged in such generality." This decision has not been overruled: *vide* 1 Leo. 170; 2 Roll Abr. 786; but, on the contrary, it is cited with approbation by Mr. Sanders, 340a, in his treatise on uses and trusts. In *Mildmay's case*, as also in *Sanders's*, it is admitted that a consideration may be averred and proved; and, if so, then that will be sufficient to raise the use in the bargainee. Blackstone, 2 Bl. Comm. 296, in his commentaries, lays down the law to be, "that a deed or other grant, made without any consideration, is, as it were, of no effect, for it is construed to inure, or to be effectual only, to the use of the grantor himself." The learned Mr. Christian, in his note upon the text of Blackstone, says, that he conceives this to be true only of a bargain and sale, and cites Sheppard's Touchstone, p. 221, to establish the difference between a bargain and sale and a gift; and, according to him, "the latter may be without any consideration or cause at all, but the former hath always some meritorious cause moving it, and cannot be without it."

That the words, for value received, have a more extensive meaning, or import a consideration with more certainty, than the words, for divers good considerations, can scarcely be pretended. Indeed, it has been settled in this court, in the case of *Lansing v. McKillip*, 3 Caines, 287, that the words value received, in a note, not within the statute, did not import such consideration as would support the promise, but that the consideration must be set forth. And *non constat*, but that something altogether without value, and against law, was the real consideration.

The position so frequently met with in the books, that every deed imports a consideration, is true only with respect to such deeds as are sought to be enforced as between the parties.

Deeds conveying lands stand on different grounds, and have principles peculiar to themselves; and I cannot admit, that the instrument under consideration declares the use to Hudson, and that, therefore, a consideration is not necessary; for it is impossible to conceive a more bald and naked deed (if it deserves that appellation) in all its provisions.

It may, perhaps, be said, that the want of a precise consideration in the deed is mere matter of form, and that, had this deed been pleaded without any averment as to the consideration, the omission could have been taken advantage of only by a special demurrer, and would have been good on a general demurrer. This brings the question back to the point whether it is essential to the validity of a deed that it should either express a consideration, or that one should be averred and proved. From the authorities already cited, it appears that a consideration is not matter of form, but of substance. Other cases may be added to the same effect: 1 Lev. 170; Moore, 569; 1 Mod. 262; 2 Mod. 249. There is some diversity in the books, whether even a verdict would cure the omission of an averment of a consideration, the latter adjudications are that it will: 1 Ld. Raym. 111; 2 Str. 1228; 1 Wils. 91. If a verdict will cure such omission, it is on the well-established principle, that it being essential to the validity of the deed, that a consideration be proved, after verdict it will be intended; and the omission does not evince a defective title, but a title defectively set forth.

In the case of *Bolton v. The Bishop of Carlisle*, 2 H. Black. 261, the court seemed to think, that such a defect was only to be taken advantage of on a special demurrer, on the principle that it was a matter of form. On this decision I have no other observation to make, but that it is since our revolution, and contrary to all the cases on the subject.

THOMPSON, J. This case has been submitted without argument, and the question presented for our decision is, whether the instrument in writing given by Joseph Brown to Daniel Hudson, be sufficient to convey the title to the premises in question. The want of any consideration either expressed on the face of the instrument, or proved at the trial, is the principal objection to its operation. All deeds by which land may be conveyed, derive their effect from the common law, or from the statute of uses. It cannot be pretended that this instrument can take effect as a common law conveyance, either original or derivative: 4 Cruise, on Real Property, 100. If it

is to have any operation, it must be as a bargain and sale, by virtue of the statute of uses. That statute has given rise to several new forms of conveyance, which operate contrary to the rules of the common law. It is a general rule of the common law, that it is not absolutely necessary that a consideration should be expressed in a deed. The thought and deliberation, which was supposed to attend the making and executing of deeds, rendered them valid, without any consideration expressed. Soon, however, after the chancellors had assumed a jurisdiction in cases of uses, they adopted the maxim of the civil law, "*ex nudo pacto non oritur actio*," and in conformity to it, they determined not to lend their aid to carry any deed into execution, unless it was supported by some consideration: 4 Cruise, 24. Hence it has become a universal rule, that a use cannot be raised without a consideration; and a bargain and sale, being merely a conveyance of a use, it cannot be effectual without a consideration, which must be valuable, for the very name of the conveyance imports a *quid pro quo*: 1 Co. 176 a; Sanders on Uses, 840; 2 Inst. 671; 4 Cruise, 173-8. That a consideration is requisite to raise a use, is a principle recognized by almost every elementary writer on the subject, and has been repeatedly sanctioned by adjudged cases. The expression of Sir Wm. Blackstone, 2 Comm. 296, may be too broad when he says, that a deed or grant made without any consideration, is of no effect, and is to be construed to inure, or be effectual only to the use of the grantor. Yet Professor Christian, in his note on this passage, admits this position to be true with respect to a bargain and sale. Baron Comyns, also, says that a bargain and sale of land, whereby a use arises, ought to be made upon a valuable consideration, otherwise no use arises; and the consideration must not be too general, but must import a *quid pro quo*: 2 Com. Dig. 6; 3 Com. Dig. 275-7. We find the same principle recognized by the late editor of *Bacon's Abridgment*: 1 Bac. Abr. 496; Shep. Touch. 220. It is there said, that by a bargain and sale of land, no use arises unless there be a consideration of money; for selling, *ex vi termini*, supposes the transferring a right of something for money, and if there be no such consideration, it may be an exchange, a covenant to stand seised, a grant, etc., but can be no sale within the statute. The judgment of the court in *Mildmay's case*, 1 Coke, 176, was governed by the same principles; and in *Doe ex dem. Milburn v. Salkeld*, Willes, 675, Lord Ch. J. Willes, in delivering the opinion of the court upon the nature and operation of a deed, set forth in

the case, observes it cannot be considered as a bargain and sale, because there was no money consideration.

In the case of *Ward v. Lambert*, Cro. Eliz. 894, the deed recited "that whereas, I. S. was bound in a recognizance, and other bonds for him, he, for divers good considerations, bargained and sold the land to him and his heirs;" and this was held not to be a good bargain and sale. The court said: That in every bargain and sale there ought to be a *quid pro quo*; but the vendor there had nothing for his land, and, therefore, it was void. If a man give land, or bargain and sell land to his son, no use arises thereby. If, then, a valuable consideration be necessary to raise a use, the next question will be, whether the instrument before us, upon the face of it, imports the consideration required in a bargain and sale, under the statute of uses. If it does, it must arise either from the internal force of the words "for value received," or by virtue of the seal. A valuable consideration is defined in the books, to mean money, or any other thing that bears a known value: 4 Cruise, 24. This court, in the case of *Lansing v. McKillip*, 3 Caines, 288, considered the words, for value received, of little force and importance of themselves, towards making out a consideration. Independently of that decision, however, I cannot discover more efficacy in these words than in many others which have been used in instruments, that have been adjudged inoperative as bargains and sales. All the cases I have cited to show the necessity of a consideration, plainly indicate, that if it is to be inferred from the face of the deed, it ought to be expressed as necessarily to import value. It must not, in the language of Baron Comyns, be too general. It seems to me, that as much may be inferred from the word consideration as the word value. And it has repeatedly been adjudged, that an acknowledgment of the receipt of a consideration generally was not sufficient. Although this may have the semblance of a technical nicety, incompatible with the broad principles of justice, yet the rule appears to me to be too firmly established to be overturned. Many of the common law principles, applicable to other contracts, cannot be applied to bargains and sales under the statute of uses.

In *Mildmay's case*, and also that of *Ward v. Lambert*, before referred to, the words, divers good considerations, were considered insufficient to raise a use, being but general parlance, implying nothing, unless express considerations were shown; for otherwise none would be intended. So in *Fisher v. Smith*, 5

Vin. Abr. 406, note, the court were clear, that if one pleads a bargain and sale, in which no consideration of money is expressed, then he ought to supply it by an averment that it was for money; and that the words, for divers good considerations, shall not be intended for money, without an averment; but if the deed expresses, for a competent sum of money, it is sufficient, without showing the certainty of the sum; and none shall say that no money was paid; for against this express mention in the deed, no averment that no money was paid shall be admitted. An acknowledgment in the deed of the receipt of money, *ex vi termini*, imports value, and the amount of the consideration is immaterial. It has been repeatedly ruled, that if in pleading a bargain and sale, no valuable consideration is shown, it will be ill on demurrer. In many cases the verdict has been deemed to cure this defect, which must have been on the ground, that after verdict, the consideration is presumed to have been proved on the trial: 1 Lord Raym. 111; 1 Wils. 91; 2 H. Black 261. From all the cases referred to, it is evident that the court did not consider the seal as virtually importing the requisite consideration; for the instruments, although under seal, were deemed inoperative as bargains and sales. It would have been competent for the plaintiff, in the present case, to have proved a consideration paid, 5 Vin. 507, which, in my opinion, would have made the deed effectual to transfer the title; the word grant being sufficient to pass the land by way of use: 2 Mod. 253. Under this view of the case, I should be inclined to grant a new trial, to give the plaintiff an opportunity of producing this proof, if in his power, without the expense of a new action; but according to the stipulation in the case, a judgment of nonsuit, in my opinion, ought to be entered.

KENT, C. J. I am of the opinion that the deed from Brown to Hudson was sufficient to convey his interest in the premises. I agree that the deed, if it operates at all, must operate as a bargain and sale under the statute of uses. At the common law, a feoffment or lease was valid, without any consideration, in consequence of the fealty or homage which was incident to every such conveyance. The law raised a consideration out of the tenure itself. But after the statute of *Quia Emptores*, 18 Ed. 1, Perkins says, that a consideration became requisite even to the validity of a feoffment, as none could be implied, since, according to the statute, no feudal duty or service resulted to the immediate feoffor: Perkins, sec. 528-537. The general,

and the better opinion is, that the notion of a consideration first came from the court of equity, where it was held necessary to raise a use; and when conveyances to uses were introduced, the courts of law adopted the same idea, and held that a consideration was requisite in a deed of bargain and sale. This new principle in the doctrine of assurances by deed, met, at first, with a very strong resistance from the ablest lawyers of the age. Plowden, in his argument in the case of *Sharington v. Stroffen*, 1 Plowden, 308, 309, which arose upon a deed under the statute of uses, contended, with great force of reason and authority, that a deed, which was a solemn and deliberate act of the mind, did of itself import a consideration; that the will of the grantor was a sufficient consideration, and it never could be called a *nudum pactum*. Lord Bacon, in his reading on the statute of uses, takes notice of this argument of Plowden, and gives it the weight of his sanction. "I would have one case showed," said he, "by men learned in the law, where there is a deed, and yet there needs a consideration. As for parole, the law adjudgeth it too light to give an action without consideration; but a deed, even in law, imports a consideration, because of the deliberation and ceremony in the confection of it; and, therefore, in 8 Regiæ, it is solemnly argued that a deed should raise a use without any other consideration:" Bacon's Works, vol. 4, p. 167. But notwithstanding this strenuous opposition, the rule from chancery prevailed, and it has been long settled, that a consideration, expressed or proved, was necessary to give effect to a deed of bargain and sale. I am not going to attempt to surmount the series of cases on this subject, though I confess myself a convert to the argument of Plowden. I admit the rule that a consideration is necessary to a conveyance to uses; but I think that here is evidence of a consideration, appearing on the face of the deed before us, sufficient to conclude the grantor, and to give effect to it as a bargain and sale.

The rule requiring a consideration to raise a use, has become merely nominal and a matter of form; for if a sum of money be mentioned, it is never an inquiry whether it was actually paid, and the smallest sum possible is sufficient; nay, it has been solemnly adjudged, that a pepper-corn was sufficient to raise a use: 2 Vent. 35. Since, then, the efficacy of the rule is so completely gone, we ought, in support of deeds, to construe the cases which have modified the rule, with the utmost liberality.

The deed in the present case states, that "for value received of the grantee, he doth grant," etc., and can it now be per-

mitted to the grantor to say there was no value received? Value received is equivalent to saying, money was received, or a chattel was received. It is an express averment, *ex vi termini*, of a *quid pro quo*. In *Fisher v. Smith*, Moore, 569, there was a bargain and sale for divers considerations, and it was held not to be enough, without an averment that it was for money: "But if the deed express for a competent sum of money, this is sufficient without mentioning the certainty of the sum, and against this express mention in the deed, no averment or evidence shall be admitted to say that no money was paid." All the cases that I have examined, which say that a general consideration is not sufficient, are cases in which the words in the deed were for divers good considerations. I have not met with any case which goes so far as to say, that an averment in the deed of value received by the grantor, was not sufficient. It is said in 2 Roll. Abr. 786, pl. n., that "an averment that a bargain and sale was in consideration of money or other valuable consideration given, was sufficient." If the words had been, for money received of the grantor, then the deed would have fallen exactly within the decision in Moore, and would have been good, according to the admission in all the books. I cannot perceive any essential difference between the two averments; value received does, in judgment of law, imply money, or its equivalent. The grantor must be estopped by this express averment in his deed. He admits not only a value, but a value received from the grantee; and if we will not intend this value to be something valuable, or equal to a sum of money, we seem not to construe charters as they did in the case of *Fisher v. Smith*, and as the law axiom requires them to be examined, benignly, and in support of the substance. The statute of 9 and 10 Wm. III, c. 17, regards those words of so much import, that if a bill contains them, the holder is then entitled to recover interest and damages against the drawer and indorser and in *Cramlington v. Evans*, 1 Show. 4; Carth. 5, Lord Holt laid great stress on these words. "If the drawer," he says, "mention for value received, then he is chargeable at common law; but if no such mention is made, then you must come upon the custom of merchants only." I mention these authorities only to show that these words mean something; and that in certain cases, at least, the law has attached the meaning of real actual value to the averment of value received, and that in those cases it has been considered as equivalent to saying for money received.

The law, from the beginning, has been very indulgent in helping out deeds on the ground of consideration. If no consideration be expressed, one may be averred in pleading, or proved upon the trial: *Mildmay's case*, 1 Co. 175; *Fisher v. Smith*, Moore, 569. In pleading a bargain and sale, in which no consideration is expressed, it was held, in *Smith v. Lane*, Moore, 504, that the bargainee need not aver payment of money, because it was implied. This was afterwards held otherwise; but it has lately been held by the court of C. B., 2 H. Black. 259, that this averment was but matter of form, and the omission of it cured, on a general demurrer. This last decision seems to have almost done away even the form of the old rule, for it can hardly be necessary to prove upon trial, under the general issue, a fact which is matter of form and not of substance. A plaintiff is bound to prove only what would be considered as material averments, and matters which go to the substance of the action.

But I place my opinion on the ground that the deed contains a sufficient averment of a consideration to estop the grantor, and to give the deed operation under the statute of uses. I am not apprised of any case which is an authority against this conclusion. In *Lansing v. McKillip*, 3 Caines, 286, two of the judges intimated that value received did not supersede the necessity of averring and proving a consideration in a special agreement; but another of the judges went largely into the support of a contrary opinion. The case, however, was not decided upon that ground, but upon another, viz.: that where the plaintiff alleges two good considerations in his declaration, he must prove them as laid.

The next point in the case is, whether the words "make over and grant" be sufficient to convey Brown's interest in the land. The word "grant" has been held sufficient to pass lands by way of use: 2 Mod. 253; T. Raym. 48. Though in its original meaning, the word applied only to a conveyance of incorporeal hereditaments, which could not pass by livery of seisin, yet in conveyances under the statute of uses, it is sufficient if the granting words are competent to raise a use; for the statute then performs the task of the ancient livery of seisin.

My opinion on both points, accordingly, is that the plaintiff is entitled to judgment.

VAN NESS, J., and YATES, J., were of the same opinion.

Judgment for the plaintiff.

HOWES v. BARKER.

[3 JOHNSON, 506.]

PAROL EVIDENCE AS TO QUANTITY OF LAND CONVEYED.—Where a deed was executed and delivered conveying a certain number of acres of land, it was held that no parol evidence was admissible to show a mistake in the quantity mentioned in the deed; and that no action could be maintained for money had and received, to recover the money paid for the number of acres alleged to be deficient.

ASSUMPSIT, for money had and received, paid out and expended, and lent and advanced. Plea, *non assumpsit*.

On opening the cause to the jury, plaintiff's counsel stated that plaintiff and defendant had executed articles of agreement by which defendant agreed to sell plaintiff a certain tract of land, at nine pounds per acre; that defendant executed a deed containing the usual covenants, wherein the number of acres was expressed to be two hundred and seventy-five; that plaintiff paid defendant as for two hundred and seventy-five acres, at nine pounds per acre; that upon a survey by plaintiff, he afterwards discovered that there were but two hundred and sixty-three acres, and that this action was to recover the sum paid for the twelve acres not conveyed. Defendant moved for a nonsuit; and the judge being of opinion that no action could be maintained on these facts, plaintiff offered to prove that the parties had agreed that the quantity of acres conveyed should be the subject of future inquiry, and that the sum paid should be rectified by the actual quantity of land. This evidence was rejected. Plaintiff then offered to prove that defendant had acknowledged the mistake in the number of acres, after the execution of the deed, and had promised to refund the money so received by mistake; and for this purpose plaintiff produced the following letter written by defendant to plaintiff, which was admitted: "I will come down next week, and early enough in the day to send for Mr. Baldwin. All I want is to be convinced of the quantity of land, and Baldwin says he can do it." The judge being of opinion that neither the facts nor the evidence were sufficient to support the action, ordered a nonsuit.

J. Tallmadge, on behalf of the plaintiff, moved to set aside the nonsuit, urging that this was not an attempt to impeach a written agreement, but to recover money paid under mistake; that if equity would relieve for fraud or mistake in this case, the present form of action in a court of law was sufficient to entitle plaintiff to relief: *Sugden's Law of Vendors*, 119, 201; 2 *Eq. Cas. Abr.* 688.

Emott, contra, urged that parol evidence was inadmissible to vary in any manner, a written contract: 2 W. Bl. 1239; 1 John. 414 (*ante*, 339). The plaintiff is, in law, estopped to aver a mistake in his own solemn deed, and he does not allege fraud.

THOMPSON, J. Could the plaintiff's action in this case be sustained at law, without infringing upon what I consider well settled principles, I should think the nonsuit ought to be set aside; for if the facts offered to be proved were true, there has been a mistake made in the deed which ought to be rectified. But relief, in my opinion, is not to be had in a court of law. There is no pretense of any fraud having been practiced upon the plaintiff. The most that can be alleged is, that there has been a mistake with respect to the insertion of the consideration money in the deed. The contract between the parties, according to the articles of agreement, was executory, and having been executed and consummated by the deed subsequently given, the agreement became null and of no further effect. If it remained in force, the action, if at all sustainable, should have been upon the covenant. This is not like the case of *Weaver v. Bentley*, 1 Caines, 48. The court there sustained the action for money had and received, on the ground that the defendant having altogether failed to perform the contract on his part, the plaintiff had his election either to proceed on his covenant for damages, or to disaffirm the contract, and to bring his action to recover back the money he had paid.

The present case, however, is not one where the plaintiff claims the right of disaffirming the contract, but has consummated it by the acceptance of a deed. The deed cannot be considered as an execution of the contract in part only. If an execution at all, it must be of the whole contract, and the articles of agreement are a nullity. If so, the testimony offered in support of the plaintiff's action, to show that the consideration expressed in the deed was more than ought to have been paid, could be viewed in no other light than as parol evidence, repugnant to the written contract. That such testimony is not admissible has been repeatedly ruled in this court: 2 Caines, 161; 1 Johnson, 418 (*ante*, 339). The language of the court, in those cases, was, that it cannot be a safe or salutary rule, to allow a contract to rest partly in writing, and partly in parol. Whenever it is reduced to writing, that is to be considered the evidence of the agreement, and everything resting in parol, becomes thereby extinguished. I cannot perceive why any parol

agreement, varying the consideration money expressed in the deed, does not fall within this rule, as much as if it related to any other part of the contract. There is, however, an express adjudication of this court on that point, in the case of *Schemerhorn v. Vanderheyden*, 1 Johnson, 140 (*ante*, 304). The court there say: "The consideration for the assignment is expressly stated in the deed of assignment itself, and the parties are thereby precluded from setting up any greater or different consideration. To allow of parol evidence for that purpose, would be to extend or substantially vary the language of a written contract. Though the promise in question may have been made previously to the assignment, yet after the execution of the instrument, we must presume that the father and son altered the consideration mentioned at first, and finally acted upon that which is set forth in the assignment." So in the case before us, we must presume, after the execution of the deed, that the consideration therein mentioned was the one finally agreed on between the parties. The testimony offered to show an agreement at the time the deed was executed, to have the land resurveyed and the price regulated by that survey, was properly rejected, as coming within the principle adopted by this court in the case of *Mumford v. McPherson*, 1 Johnson, 414 (*ante*, 339); see, also, *Bradley v. Blodget*, Kirby, 22 (1 Am. Dec. 11). The plaintiff was permitted, on the trial, to adduce testimony to show that the defendant had, after the execution of the deed, acknowledged the mistake and promised to refund the money; but he altogether failed in establishing such a promise. Whatever view, therefore, is taken of the case, I think the nonsuit ought to stand, and that the present motion must be denied.

SPENCER, J., was of the same opinion.

KENT, C. J. I am of the same opinion. I confess that I have struggled hard, and with the strongest inclination, to see if the action for money had and received would not help the plaintiff in this case; but I cannot surmount the impediment of the deed, which the plaintiff has accepted from the defendant, and which contains a specific consideration in money, and the quantity of acres conveyed, with the usual covenant of seisin. Sitting in a court of law, I think I am bound to look to that deed, as the highest evidence of the final agreement of the parties, both as to the quantity of the land to be conveyed, and the price to be given for it. If there be a mistake in the deed, the plaintiff must resort to a court of equity, which has had a

long established jurisdiction in all such cases, and where even parol evidence is held to be admissible to correct the mistake: 1 Ves. 317; 3 Bro. C. C. 454; 5 Ves. Jr., 595, 596; 6 Id. 333, 334. The motion to set aside the nonsuit must be denied.

VAN NESS, J., having been of counsel, and YATES, J., not having heard the argument, gave no opinion.

Judgment of nonsuit.

AM. DEC. VOL. III—34

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

HAMPSON v. EDELEN.

[2 HARRIS & JOHNSON, 64.]

EQUITABLE TITLE OF VENDEE PROTECTED AGAINST JUDGMENT. — A contract for the purchase of land made *bona fide* for a valuable consideration vests the equitable interest in the vendee from the time of the execution of the contract, although the money is not then paid. A judgment obtained by a third person against the vendor between the making the contract and the payment of the money, during which the vendee was in possession, cannot defeat the equitable interest thus acquired, nor is it a lien on the land affecting the right of the vendee.

APPEAL from the court of chancery. Edelen filed his bill, stating that he purchased a certain tract of land of one Wade, in September, 1797, giving up, in part payment therefor, a certain bond which Edelen held against Wade; that in December, 1797, complainant received full and absolute possession of the premises, which he has held ever since; that he used and cultivated the land, and having, on the twelfth November, 1798, paid the remainder of the purchase-money, obtained a conveyance for the same; and that defendant, Hampson, has, by virtue of judgments recovered in May, 1798, against Wade, sued out a *fieri facias* which has been levied upon the land in question. The bill concluded with a prayer for an injunction to enjoin further proceedings under the *fieri facias*.

An injunction was granted, and from the decree of Hanson, chancellor, that the injunction be made perpetual, Hampson appealed.

T. Buchanan, for the appellant, urged a man purchasing under a parol agreement should not be protected against a judgment creditor, under a judgment rendered against the vendor

subsequent to the sale, and prior to any conveyance of the land: *Sorrel v. Carpenter*, 2 P. Wms. 482; *Worsley v. The Earl of Scarborough*, 3 Atk. 892; *Churchill v. Grove*, 1 Chan. Cas. 85; *Bovey v. Skipwith*, Id. 201; *Peach v. Winchelsea*, 10 Mod. 468; *Finch v. Winchelsea*, 1 P. Wms. 277; 2 Pow. on Cont. 58, 34; *Brandlyn v. Ord*, 1 Atk. 571; *Marlow v. Smith*, 2 P. Wms. 199; *Tourville v. Naisch*, 8 Id. 807; *Wigg v. Wigg*, 1 Atk. 384.

Shaaff, for the appellee.

By Court, CHASE, C. J. In this case it appears that a considerable part of the purchase-money was paid, and possession given of the land, prior to the obtention of the judgments by Hampson against Wade. A contract for land, *bona fide*, made for a valuable consideration, vests the equitable interest in the vendee from the time of the execution of the contract, although the money is not paid at that time. When the money is paid, according to the terms of the contract, the vendee is entitled to a conveyance, and to a decree in chancery for a specific execution of the contract, if such conveyance is refused. A judgment obtained by a third person against the vendor, *mesne* the making the contract and the payment of the money, cannot defeat or impair the equitable interest thus acquired, nor is it a lien on the land to affect the right of such *cestui que trust*. A judgment is a lien on the land of the debtor, and attaches on it as a fund for its payment; but the legal estate in the land is not vested in the judgment creditor, although he can convert it into money, to satisfy his debt, by pursuing the proper means.

Decree affirmed.

The authority of this case was recognized in *Moyer v. Hinman*, 13 N. Y. 184, and the same doctrine laid down, the court saying: "In accordance with this view, it was held, in a case in Maryland, that where the vendee, subsequently to the recovery of a judgment against the vendor, but without actual notice thereof, had paid over a balance of the purchase-money and taken a conveyance from the judgment debtor, such vendee was in equity entitled to be protected against the claims of the judgment creditor. And we have the deliberate judgment of the court of errors of this state upon the same point in an action at law: *Parks v. Jackson*, 11 Wend. 442." In this case, also, the principal case is cited. The authority of the principal case is recognized in *Corporation of Georgetown v. Smith*, 4 Cranch C. C. 93, and *Tayloe v. Thomson*, 5 Peters, 368. See Freeman on Judgments, sec. 364, treating of the doctrine laid down here.

BEALL v. HARWOOD.

[2 HARRIS & JOHNSON, 167.]

CONSTRUCTION OF STATUTE.—In the construction of a statute, the intention of the legislature should prevail, and should be collected from the whole law, and the circumstances which produced it. Accordingly, where a statute recited that A., who was living, had only female heirs, and it appeared that A. had two daughters, named B. and C., and no other children, it was held that by the words female heirs were meant the two daughters of A.

RIGHT OF MORTGAGOR TO MAINTAIN EJECTMENT.—A mortgagor cannot maintain ejectment for the land mortgaged, unless he can show that the mortgage has been satisfied previous to the commencement of the suit.

APPEAL from the general court. The plaintiff, the appellant, brought an action of ejectment; general issue pleaded. It appeared that Hollyday died in December, 1739, seised of the land in question, which he devised as follows: 1. To his second son, Leonard, in tail male; 2. Remainder in tail male to his eldest son, Thomas; 3. Remainder in tail male to his third son, Clement; and 4. Remainder in fee to his two daughters, Elizabeth and Mary, as tenants in common. Leonard entered by virtue of this devise, and became seised of the premises. Being so seised, and having only two female children, he presented a petition, in which his eldest brother, Thomas, joined, to the general assembly of 1756. In consequence of this petition, an act was passed entitled “An act to vest certain intailed lands therein mentioned in the female heirs of Leonard Hollyday, gentleman, in fee-simple,” which act, after reciting the provisions of the elder Hollyday’s will, and that Leonard’s daughters could not take the lands by virtue thereof, but that they would vest in Thomas, who was party to the petition, and consented thereto; and, after declaring that the petition seemed to the assembly reasonable, enacted that the lands devised to Leonard and his male heirs “shall be, and the same are, hereby vested in the said female heirs of Leonard Hollyday, their heirs and assigns, to the only use and behoof of them, the said female heirs of the said Leonard Hollyday, their heirs and assigns forever; provided, always, and it is the true intent and meaning of this act, that if the said Leonard Hollyday shall have any male heirs of his body at the time of his death, or that the said female heirs of the said Leonard Hollyday shall not have issue, that then and in such case” the lands were to descend and stand limited as devised by the will of the testator, any law, usage or custom to the contrary notwithstanding, etc.

Leonard afterwards had a son, to whom, in the year 1791, he bargained and sold, for valuable consideration, all his right, title and interest in the premises, in fee. The son entered upon and was seised of the premises, and being so seised, died in 1793, leaving three daughters the lessors of the plaintiff, Beall. Leonard died in 1794, leaving issue two daughters. Defendant claimed as the husband of the only child and heir of the survivor of these two daughters, and had entered and taken possession by virtue of the act of assembly.

CHASE, C. J. In this case the counsel have said everything which could be suggested upon the subject. They have made use of ingenious arguments. There can be no doubt but it has been fully and ably argued on both sides. The court think that the intention of the legislature is to prevail, and that intention is to be collected from the whole of the law, and the circumstances which produced it.

The case is to be considered: 1. What was the intention of the legislature? 2. Have they used clear words to express that intention? 3. What is the effect of the enacting clause, and does it carry their intention into effect?

The motive does not satisfactorily appear; but facts do appear in the petition, as recited in the act, which are, that the land would, by the will, vest in Thomas; that Leonard had no son, but he had daughters who could not inherit; that he had improved the land, and had a solicitude to provide for his daughters. It is apparent to the court that Leonard had little or no expectation of having any other children; he had in view to provide for the children he then had. Thomas, his brother, knowing of the improvements made on the land by Leonard, and actuated by motives of affection, concurred in the petition. It appears that the operation under the will was intended to be suspended. The petition sets forth that Leonard had "only female heirs, who could not inherit." This was nothing more than a description of the persons who were to take under the law. The prayer of the petition was "to vest in the female heirs" of Leonard Hollyday, in fee-simple. "Female heirs" meant the two daughters of Leonard Hollyday, and that the estate was to vest immediately in them. It appears that the petition had in view to provide for the two daughters. The legislature granted the petition. Has the enacting clause carried the intention into effect? "Shall be and are hereby vested in the said female heirs." The intention must be to vest the estate in the daughters then in being. It is a plain designation

of the persons who were to take; and that an estate in fee-simple should be vested in the two daughters, to be defeated only upon the happening of two contingencies. If the events, or either of them had happened, the estate in fee-simple would have divested and let in the operation of the will. This shows that by the act there was to be a suspension of the estate. It was the act of the father providing for his children, with a proviso in case of male heirs, or the death of his daughters without issue. Thomas made a greater sacrifice than Leonard.

What would be the effect, if the construction contended for on the other side, was to prevail? It would be putting it in the power of one party to defeat the provisions of the legislature. Such a construction could never be admitted. The children of Leonard Hollyday (the son) never could have inherited under the will.

The court are of opinion, that an estate in fee-simple vested in the two daughters of Leonard Hollyday, which estate was to be defeated and divested out of the daughters on the happening of either of two contingencies: 1. If Leonard Hollyday (the father) left issue male at the time of his death; 2. If Leonard Hollyday should die without leaving issue male at the time of his death, and his two daughters should die without leaving issue. On the happening of either of said events, the estate in fee-simple which was created in the two daughters, was to be divested, and the limitations in the will, which were suspended by the act of the legislature for the purpose of providing for his two daughters, were to be again put in operation. And the court are of opinion, that the plaintiff is not entitled to recover the land. The plaintiff excepted.

The defendant then offered in evidence a mortgage of a portion of the premises, executed by the son, and prayed the opinion of the court that plaintiff was not entitled to recover, unless he could show that this mortgage had been satisfied prior to bringing the ejectment.

CHASE, C. J. The court are of opinion, that the mortgage created a legal estate in the land in Benjamin Mackall, the mortgagee, and his heirs; and that the plaintiff cannot recover unless he proves the mortgage was satisfied previous to the bringing this ejectment. The plaintiff excepted, and the verdict and judgment being against him, he appealed to this court.

Martin and Shaaff, for the appellant, cited in support of their position: *Shelley case*, 1 Coke, 102, 103; Shep. T. 103; *Chew's*

Lessee v. Weems, 1 Har. & McHen. 463; Pow. on Mort. 221, 222; *The King v. St. Michael's*, Doug. 632; *Lade v. Holford*, 8 Burr. 1416; *Doe v. Bristow & Pegge*, 1 T. R. 758, note.

Key, Mason and Johnson, attorney-general, for the appellee, relied upon: *Wheatley v. Thomas*, 1 Lev. 75; *Walker v. Collier*, Cro. Eliz. 379; Co. Litt. 27 a; *Prince's case*, 8 Co. 1; *Murrey v. Eytom & Price*, T. Raym. 855; Shep. T. 108, 109, 119; Pow. on Cont. 336, 337, 376, 377; Pow. on Dev. 876, 877; *Doe v. Wharton & Dixon*, 8 T. R. 2; *Doe v. Staple*, 2 T. R. 696; *Armstrong v. Peirse et al.*, 8 Burr. 1901.

The COURT, TILGHMAN, BUCHANAN and NICHOLSON, JJ., concurred in the opinions expressed by the general court in both of the bills of exceptions.

Judgment affirmed.

In *Cearfoss v. State*, 42 Md. 407, this case is cited on the construction of a statute of the court, saying that "where clear words are used to indicate the purpose, there is no necessity to resort to other aids." So in *Charles v. Clagett*, 3 Md. 87; *Erwin v. Moore*, 15 Ga. 365; *Sisters of Charity v. Detroit*, 9 Mich. 99; *Gadaden v. Jones*, 1 Fla. 342.

DE SOBRY v. DE LAISTRE.

[2 HARRIS & JOHNSON, 191.]

PROOF OF COPY OF WILL IN FOREIGN JURISDICTION.—Where a will executed in Philadelphia was transmitted by the testator to Martinique, where it was deposited, according to the laws of that island, with a notary, it was held that a copy of the will made by the notary, whose signature was certified by the colonial officer of the island, was sufficiently authenticated.

RECORDS OF FOREIGN JUDGMENT.—Where a copy of a record of a judgment in Martinique was authenticated by the signature and seal of office of the grand judge of the island and colony of Martinique, it was held that parol evidence was admissible to prove the signature and seal of office of such judge, and that he had sole authority by the laws of the island to authenticate judicial proceedings. A seal of a foreign court does not prove itself, but must be proved by testimony. Where an official copy of a foreign judgment is produced, it is to be presumed that it is a full copy.

ADMISSION OF LETTERS IN EVIDENCE.—The letters of a witness may be read in evidence, to impeach his credit as to what he had sworn to on examination under a commission, but not as evidence of any other facts.

CONSTRUCTION OF CONTRACTS.—It is a general principle, admitting of few exceptions, that in construing contracts made in a foreign country,

the courts are governed by the *lex loci contractus*, as respects the essence of the contract; that is, the rights acquired and the obligations created by it, but the remedy or mode of enforcing it is to conform to the laws of the country where the action is instituted.

VALIDITY OF CONTRACT.—Where, by the terms of a contract, it is to be executed in another country, there the parties tacitly adopt the laws of that country for its interpretation, and its validity is determined by its laws; but where a contract is *contra bonos mores*, as for the price of prostitution, such a contract, though legal in some countries, would not be enforced here.

EVIDENCE TO CHARGE DEFENDANT IN ASSUMPSIT.—If the plaintiff, in an action of *assumpsit*, files an account in court containing the items of his claim against the defendant, he is precluded from going into evidence to establish his claim in a manner different from that in which he has elected by his account to consider the defendant his debtor.

PERSONAL PROPERTY, HOW DISTRIBUTED.—The personal property of a testator is to be distributed according to the laws of the testator's domicile.

ASSETS, ADMINISTRATION OF.—Any fund of a deceased person in the hands of his ancillary executor, in a state, is liable to all creditors, without reference to their citizenship or residence, according to the laws of the state where the executor acts, and any surplus which remains in the hands of an ancillary executor after payment of creditors, goes into the mass of the estate, to be distributed according to the laws of the country where the testator was domiciled.

PROOF OF FOREIGN LAWS.—The laws of a foreign country are to be proved by evidence, and the court is to decide what is the proper evidence of such laws, and to judge of the applicability of such laws when proved to the case before the court; but such laws are matters of fact to be found by the jury.

ERROR to general court. Lewis Augustine Terrier de Laistre brought an action of *assumpsit* against Benjamin De Sobry, executor of Michael Terrier de Laistre. The declaration contained four counts. The first for four thousand five hundred and eighteen pounds seventeen shillings and seven pence for various items due on an account; the second, third and fourth for money received, laid out, expended, etc. The defendant pleaded *non assumpsit* and *plene administravit*, to which general issue was joined.

In the course of the trial at October term, 1804, the defendant offered certain testimony returned with a commission to take the deposition of a certain notary as to the contents of a will and codicils deposited in the island of Martinique. Attested copies of the will and codicils were annexed to the deposition. Annexed to the notary's certificate was the following attestation of his authority:

“ We, John Augustine Regnaudier, commissioner of the king,

and procureur (attorney), holding for this purpose the place in the absence of Mr. John Aman Astory, commissioner of the king, titular senechal of St. Pierre, Martinique, certify to all whom it may concern that the above signature is that of Mr. Ciceron, notary, dwelling in this island, and that faith ought to be given to it as well in courts of justice as thereout, and to all that he signs in that quality. In testimony whereof, we have signed these presents, and thereto fixed the seal of this colony, where stamped paper is not in use. Given in our hotel at St. Pierre, Martinique, the twentieth July, 1801. REGNAUDIER.

“ Sealed at St. Pierre, Martinique, the twentieth July, 1821.

“ [L. s.]

JACQUIER.”

The plaintiff objected to the copies in evidence, because they were not legally proved and certified.

Martin, attorney-general, and Purviance, for defendant, stated that by the laws of France there were two modes of making wills; one was a will entirely in the handwriting of the testator, which was called an *olograph will*; the other written by a notary, agreeably to the testator's directions; and when written and read to the testator, it was a good will, and was called a *solemn will*. The will offered in evidence was an *olograph will*, executed in Philadelphia by the testator, and by him transmitted to certain notaries public in Martinique, where it remained. The commission was to ascertain if there was a will, and to have a copy exhibited and proved by the executor named in the will. It was legally authenticated. The original will could not be produced, having been lodged in the office of a notary by the testator himself, but the copy was authenticated by the notary directed by the laws of France.

Harper and Boyd, for the plaintiff, contended that it was a fixed principle in the law of evidence that a will must be proved in one of three ways: 1. The original must be produced, and the execution proved; 2. An authenticated copy from an office of record properly certified; 3. If an authenticated copy is not produced, then proof that it is a true copy from the original, if the original is in the possession of a person or officer not authorized to record it: *Peake's Evid.* 73, *notis*; *Anon.*, 8 Mod. 66; *Henry v. Adey*, 3 East, 221; *Moises v. Thornton*, 8 T. R. 308; *Stevenson v. Myers*, 1 Harr. & J. 102.

CHASE, C. J. The court are of opinion that the certificate of the colonial officer of the signature of the notary public, is suf-

ficient to authenticate the copy of the will, and that the same is sufficiently proved, and may be read in evidence to the jury:

I. Certain proceedings of the supreme court of the island of Martinique, relative to the will of the testator, were offered in evidence by the plaintiff, the exemplifications of which proceedings were signed by the secretary of the court, whose signature was thus verified:

“DEPAZ.

“We, grand judge of Martinique, certify all whom it may concern that the above signature is that of C. Le Camus, chief secretary of the court of Martinique, and that faith ought to be given to it, as well in as out of judgment. We certify, farther, that stamps are not used in this colony.

“Given at Fort de France, the thirteenth Germinal, twelfth year of the Republic. Sealed with our seal, and countersigned with our signature.

“[L. s.]

LE FESSIER, Grand Pres.

“By the Grand Judge,

“The Secretary, ———,

“FOUCHEY, Son.

“Louis Arcambal, consul of France for the state of Maryland, one of the United States of America, residing at Baltimore, certify, that Mr. Le Fessier de Grand Pre, who has signed the above legalization, is grand judge of the island of Martinique; that the signature is truly his, and that faith ought to be given to it, as well in as out of judgment. Certify also, that the grand judge is the only authority existing in the French colonies, for the legalization of judicial acts.

“In faith of which we have signed these presents, and have thereunto affixed the seal of the consulate at Baltimore, the sixth Brumaire, year thirteenth (twenty-eighth October, 1804).

“[L. s.]

L. ARCAMBAL.”

To prove that the attestation was in fact that of the grand judge, plaintiff produced in evidence a deposition, which was admitted by consent of parties, so far as parol evidence was competent evidence to prove such matters, from which it appeared that one Baudouin, a merchant of Martinique, was well acquainted with the secretary of the court, and also with the grand judge; that he knew the handwriting and signatures of these officers and the seal of the court; that the signatures attached to the exemplification and verification were the proper handwriting and signatures of the secretary and grand judge;

and that the seal affixed to the paper is the official seal of the court; and that the grand judge is the supreme authority of the colony of Martinique, and is the sole authority whereby any judicial proceedings can be authenticated.

The defendant objected to the reading of the exemplification, as being illegally authenticated, and not containing a full record of the proceedings before the supreme court in Martinique.

Harper and Boyd, for the plaintiff, contended: 1. That in proving a foreign judgment, proof of the seal of the court and handwriting of the judge was sufficient: *Henry v. Adey*, 3 East, 221; *Moises v. Thornton*, 8 T. R. 303; *Church v. Hubbard*, 2 Cranch, 238; *Peake's Ev.* 72, 73 (note), 49; 2. That the record is full and complete, according to the principles of the law of England: *Peake's Ev.* 68; 5 Bac. Ab., tit. Pleading, 323; 1 Esp. N. P. 6.

Martin, attorney-general, and *Purviance*, for the defendant, cited *Peake's Ev.* 46, 47; 3 Inst. 173; Gilb. L. & E. 17, 23; *Melan v. The Duke of Fitzjames*, 1 B. & P. 141; *Talleyrand v. Boulanger*, 3 Ves. 448.

CHASE, C. J. The court are satisfied upon the subject, and are of opinion that the mere showing the seal of a court of our own state in another court of the state is sufficient authentication of the judgment of the court it purports to certify. But if it is a judgment of a foreign court, the seal of the court does not prove itself, but must be proved by testimony. The court are of opinion that the testimony produced in this case is sufficient to prove the seal of office of the grand judge of the island and colony of Martinique. As to the record not being full enough, the court are to presume that the record produced contains all the proceedings in the court of appeals, and that it is a full record; and the court are of opinion that it is proper to be given in evidence to the jury. Besides, it is to be observed, that this record is not the matter in issue in this cause, but comes in collaterally. It seems to the court, that as this is mere matter of inducement, the same strictness is not necessary; but upon this point the court do not mean to give an opinion. In the case of *Henry v. Adey*, 3 East, 221, it was debt upon the very record produced. The court, however, are of opinion that this record is sufficiently authenticated, and ought to be read in evidence to the jury. The defendant excepted.

As to the mode in which the French law ought to be proved, *Martin*, for the defendant, contended that evidence must be

given to prove what the foreign laws are whenever there is any dispute; and that where counsel place a different construction upon the law, the court must decide which construction is to prevail.

CHASE, C. J., seemed to concur in this idea of the attorney-general, and said that the court are to decide what is proper evidence of the laws of a foreign country; and when evidence is given of those laws, the court are to judge of the applicability of such laws, when proved, to the case before court.

The defendant offered to read certain letters, admitted to be in the handwriting of Pechier, for the purpose of controverting his testimony as returned with one of the commissions in this cause. Plaintiff objected.

CHASE, C. J. The letters being admitted to be in the handwriting of Mr. Pechier, the witness, the court are of opinion they may be read to the jury for one purpose alone, that is, to impeach the credit of the witness as to what he has sworn upon his examination under the commission, contradictory to the contents of the letters; but that the letters are not admitted as evidence to prove any particular fact which may be contained therein.

Plaintiff then prayed the opinion of the court and direction to the jury, that a contract made in one country with a view to performance in another, is governed in all things as to its essence and mode of enforcement, by the laws of the latter country.

CHASE, C. J. If the contract is in writing it will itself show where it is to be executed; but if it does not appear, by the face of it, the presumption is that it is to be executed in the country where it was made. If it does appear that it has a view to be executed in a particular country, it must be carried into effect pursuant to the laws of that country. But if the contract is by parol, the party is at liberty to go into evidence to prove the intention of the parties as to where it was to be executed.

II. The plaintiff prays the court to charge the jury, that, if from the evidence, they were of opinion that the defendant's testator was, on the first of April, and thirtieth of September, 1797, indebted to plaintiff in the several sums stated in the account, and so acknowledged, and that plaintiff resided in the United States, of which testator was aware, and that testator directed, by his will of the thirtieth September, that his debts in the

United States should be paid out of property bequeathed to defendant in the United States, then plaintiff was entitled to recover of the defendant such sums so directed to be paid, in current money of this state.

Harper and Boyd, for the plaintiff, cited *Thorn v. Watkins*, 2 Ves. 86, 87.

Martin, for the defendant, cited *Thorn v. Watkins*, *Bruce v. Bruce*, 2 B. & P. 229 (notes); *Sinclair v. Monsieur de France*, Id. 363.

CHASE, C. J. The court cannot give the direction prayed for by the counsel for the plaintiff. The court are of opinion, that the facts stated, and the acknowledgments, cannot change the nature of the contract made between the plaintiff and the testator in Martinique, or prevent the construing the same according to the laws of France, so far as the same may be applicable to the contracts. If the contracts, by which the debt becomes due, were made in France, they must be governed by the laws of France. No acknowledgment of the debt due in this country can change the original nature of it. The great question depends upon what are the laws of France. If the plaintiff can establish his claim, according to the laws of France, no act of the testator can prevent his recovering it in this country. The plaintiff excepted.

III. The plaintiff prayed the direction of the court to the jury, that if they were of opinion that the testator received the thirty-four thousand nine hundred and twenty-five livres and fourteen sols, from, and to the use of plaintiff, and purchased therewith in France, merchandise, which he shipped to the United States at plaintiff's risk; and sold and disposed of the same for his own use and benefit, then plaintiff is entitled to recover the amount that the jury believe testator received for such merchandise.

CHASE, C. J. The court cannot give the direction to the jury as prayed by the plaintiff. The court are of opinion, that the plaintiff is precluded, by his account filed, from going into evidence to establish his claim for the money had and received by the testator for his use, in a manner different from that in which he has elected, by his account containing a notice of his claim, to consider the testator his debtor for his use. The plaintiff excepted.

IV. The defendant then prayed the court to direct the jury,

that if the sum retained by defendant as a legacy, or any part thereof, was liable to be recovered from him, as a part of the succession of the testator, and to be made answerable for such debts of the testator as were contracted under the French laws, the suit could only prosecute him by and in the name of the plaintiff and his brother, if they have jointly taken on themselves the management and administration of the estate, or in the name of his brother, Marc Anthony, alone, if he has alone taken upon himself the administration, but not in the name of the plaintiff alone, as the suit is now brought.

CHASE, C. J. The court are of opinion that any creditor may sue the executor *pro forma*, as he is called here, provided he shows himself to be a creditor, under the laws of the country where the contract was entered into. That as long as assets remain in the hands of the executor *pro forma*, he is answerable to the creditors; and if there is any surplus, it is to go into the mass of the succession, there to be distributed according to the laws of succession of the country where the person is domiciled. The court are of opinion that personal property adheres to the person; that wherever the person is domiciled the property goes in distribution, according to the laws of that country. Whatever fund in this country is answerable for debts is answerable to all creditors alike, provided they show themselves to be creditors, according to the laws of this country. If our laws give a preference to our citizens, the defendant should have pleaded that our citizens have that preference. The plaintiff is to be considered as a creditor and in no other capacity; and if he has not intermeddled so as to prevent his recovery as such under the French laws, he must recover in this action.

The court are of opinion, that if the jury should find from the evidence, that the plaintiff, as heir, pure and simple, or as a beneficiary heir, has not intermeddled with the estate or succession of the testator, and that the testator was indebted to the plaintiff at the time of his death, that then the plaintiff has a right to support this suit. But the court do not mean to decide, that an intermeddling by the plaintiff in the quality of heir pure and simple, or as heir with benefit of inventory, would defeat his right of action, that question being still open. The court are of opinion, that the assets in the hands of the defendant, as executor of the testator, are liable to the payment of debts due to the citizens of France from the testator, contracted there, or in the colonies of France, and that the defendant will be only accountable to the testamentary executor, the heir pure

and simple, or heir with benefit of inventory, for the surplus remaining after payment of debts, which surplus is distributable according to the laws of France. The defendant excepted.

V. The defendant then offered in evidence that the testator being a French citizen, having his domicile in the island of Martinique, died there, being possessed of certain property in the United States; that Pechier was appointed the testamentary executor; that by the French law the whole of the property, real, personal and mixed, of which testator was possessed, became in the first place liable for the payment of his debts, then of legacies, and the remainder to be divided equally among the children; that by the French law, the heir or heirs have, in the first instance, an exclusive right to take upon themselves the management and administration of the succession, and may interpose and obtain the administration, even after the testamentary executor has commenced to act; that the testator left two sons, the plaintiff and Marc Anthony, who interposed and took the management of the estate, to whom Pechier delivered up the administration, so far as it had come to his hands; that the debts and claims for which this action is brought arose in France, and are governed by her laws; that defendant, according to the will and codicils, while the administration was under the management of Pechier, and with his consent, obtained letters of administration in this state to collect the effects and pay the debts in the United States, and hold the residue according to the laws of France; that the sum remaining in defendant's hands after payment of the debts, he claims as a legacy; and that by the laws of France, no creditor, or other person, can have an action against a legatee who has obtained his legacy, unless the estate is insolvent, and such insolvency is established by the proceedings of a French court of competent jurisdiction; that plaintiff gave no evidence of any such proceedings.

Plaintiff then offered to prove that by the French law, a co-heir with benefit of inventory, who is also a creditor of the deceased, preserves in all cases his rights as a creditor, and may recover his debt wherever he can find it, without prejudice to his rights as co-heir; and that plaintiff never acted as co-heir, nor intermeddled with the estate.

Harper and Boyd, for the plaintiff, cited *The Dutch West India Co. v. Van Moses*, 1 Str. 612; 2 Huberus, B. 1, tit. 8, p. 26, cited in *Emory v. Greenough*, 3 Dall. 370 (note); *Melan v. The Duke of Fitzjames*, 1 B. & P. 142; *Robinson v. Bland*, 2 Burr. 1077, 1078,

1083; *Imlay v. Ellefsen*, 2 East, 455; *Negro Hector v. De Kerlegand*, 8 H. & McH. 185; *Wright v. Nutt*, 1 H. Bl. 152; *Folliott v. Ogden*, Id. 123; S. C., 3 T. R. 734; 3 Bac. Ab. 30; *Hunter v. Potts*, 4 T. R. 182-5; *Sinclair v. Monsieur de France*, 2 B. & P. 364 (note); *Mostyn v. Fabrigas*, 1 Cowp. 174; *Dixon v. Ramsay*, 3 Cranch, 324; *Talleyrand v. Boulanger*, 3 Ves. 448; *Thorn v. Watkins*, 2 Ves. 36; 2 Fonbl. 442; Domat, 349.

Martin, attorney-general, for the defendant, cited *Harper v. Hampton*, 1 H. & J. 453; 2 Huber. B. 1, tit. 3, p. 36; *Cummings v. The State*, 1 H. & J. 340; *Melan v. The Duke of Fitzjames*, 1 B. & P. 142; *Talleyrand v. Boulanger*, 3 Ves. 447; Vattel, B. 2, ch. 8, s. 110, 111.

By Court, CHASE, C. J. The court are of opinion that it is a general principle, which admits of a few exceptions, that in construing contracts made in foreign countries, the courts are governed by the *lex loci* as to what respects the essence of the contract; that is, the rights acquired and the obligations created by it. That the remedy or mode of enforcing the contract is to be conformable to the laws of the country where the action is instituted: *Dixon v. Ramsay*, 3 Cranch, 323, 324.

The exceptions to construing contracts according to the *lex loci*, which at present occur, are:

1. Where by the terms of the contract it is to be executed in another country; where the parties to it, by common consent, adopt the laws of that country as the rule of decision.

2. Where the contract is *contra bona mores*, as for the price of prostitution. Such a contract, though legal in some countries, would not be enforced in England, or in this state.

The court are also of opinion that unless the jury should be satisfied, according to the laws of France, that a co-heir with benefit of inventory, who is also a creditor, cannot recover in the quality of creditor, without renouncing, that then the plaintiff is entitled to recover whatever the jury may find due on the contracts made in France, according to the laws of France.

The court are also of opinion that as to that part of the sum which is claimed under the contract made in America, the plaintiff is entitled to recover, without any regard to the laws of France, whatever the jury may find due thereby.

The court are also of opinion that upon principles of common sense and justice, no part of the testator's estate is subject to distribution among his co-heirs, but the surplus, or residuum,

which may remain after payment of all the debts and legacies; and that a debt due to one of the co-heirs is as much entitled, on principles of justice, to payment, as a debt due to a stranger; and that it is incumbent on the defendant to prove to the jury that there is a law of France which extinguishes the right or claim of the co-heir creditor, with benefit of inventory, unless he renounces as co-heir.

The court are also of opinion that the laws of France are matters of fact to be found by the jury upon evidence to be produced to them; and, unless the jury find some law of France, which extinguishes the claim or right of recovery of the plaintiff, that the plaintiff has a right to recover in this case, whatever the jury may find to be due to him upon a full investigation of the evidence.

The court also inform the jury that it does not appear to the court that there is any law of France which is a legal impediment to the plaintiff's recovery. The defendant excepted.

Verdict and judgment for the plaintiff, from which defendant brought a writ of error to the court of appeals.

Winder, for the plaintiff in error.

Harper and Boyd, for the defendant.

The Court, **TILGHMAN, BUCHANAN, NICHOLSON and GANTT, JJ.**, concurred in the opinions of the general court in the first, fourth and fifth bills of exceptions taken by the defendant in that court.

Judgment affirmed.

HOLLINGSWORTH v. McDONALD.

[2 HARRIS & JOHNSON, 280.]

CONVEYANCE BY FEME COVERT.—A *feme covert* cannot transfer her interest in land unless by fine, common recovery, or deed, executed and acknowledged according to the mode prescribed by statute.

ACKNOWLEDGMENT BY FEME COVERT.—An adherence to the form prescribed by the statute for an acknowledgment by a *feme covert* is not essentially requisite, and the omission of words deemed essential can be supplied by words of equivalent import and signification. But where the word "fear," as required by the statute, was omitted from the certificate of acknowledgment, and no word of similar import or meaning substituted, it was held defective.

WORDS NECESSARY TO CREATE PARTICULAR ESTATES.—In a conveyance of a freehold or legal estate, technical words are necessary for the creation or limitation of particular estates, as to create an estate in fee, the limitation must be to the grantee and his heirs, and to

create a fee-tail to him and the heirs of his body, but the latter words are not indispensably necessary, but may be supplied by words of similar import.

APPEAL from a decree of chancery dismissing the bill of complaint. The facts were: The complainant Rachel, one of the appellants, whilst sole, executed a marriage settlement, dated September 21, 1790, by which, after reciting the intended marriage between Rachel and Hollingsworth, the premises in question were conveyed to Lyde Goodwin, his heirs and assigns, in trust for the benefit of Rachel during her natural life; "and from and after her decease that Thomas Parkin and his heirs forever, shall have and possess the said lands and premises; and in case of his, the said Thomas's death, without lawful issue, the said lands and premises shall revert to and be vested in the said Rachel and her heirs forever." After the marriage, on the fourth of January, 1796, complainants and Goodwin executed a deed to Thomas Parkin, Rachel's son by a former husband, purporting to convey a fee-simple in the lands in question. The deed was acknowledged before two justices of the peace; the acknowledgment as to the wife being as follows: "At the same time came Rachel, the wife of the said Jesse Hollingsworth, and being by us privately examined apart from and out of the presence and hearing of her said husband, did acknowledge the aforesaid instrument of writing to be her act and deed, according to the intent and meaning thereof, and declared that she made and executed the same, and this her acknowledgment thereof, voluntarily, and of her own free will and accord, without being induced thereto by threats of, or ill-usage from, her said husband, or through fear of his displeasure." Parkin died seised of the premises, which he devised to his mother. Creditors of Parkin and McKenna, who were insolvent, brought an action against complainants to have this land applied to the discharge of their claims, and by a decree of the court the land was sold. Complainants then filed their bill to have this sale set aside, urging that the Parkin was never seised of the premises, the conveyance to him by complainants not being sufficient to pass the estate of a married woman. From the decree dismissing the bill the appeal was taken.

Key, for the appellants, urged that the deed of 1790 created an estate tail in Parkin, and that the lands were not answerable for his debts: 2 Roll. Ab. tit. Grant, 65 pl. 25; Id. 68, pl. 28; Co. Litt. 21 a; Shep. T. 52, 75, 103, 113. That the deed of 1796 passed no interest from Mrs. Hollingsworth: *Webster's Lessee v. Hall*, 2 Har. McHenry, 19 (1 Am. Dec. 370).

Harper, for the appellee, contended that this was substantially a bill of review, and liable to the objections: 1. That it was too late; it was without affidavit, and was not for newly-discovered evidence: Mitf. 34. 2. That Mrs. Hollingsworth's acknowledgment was sufficient: *Webster's Lessee v. Hall*; *Gitting's Lessee v. Hall*, 1 Har. & John. 14 (2 Am. Dec. 502).

By Court, CHASE, C. J. In this case, the first question to be determined by the court is, what estate vested in Thomas Parkin, in the land in question, under and in virtue of the deed from Jesse Hollingsworth and Rachel Lyde Parkin, to Lyde Goodwin, executed on the twenty-first of September, 1790? The question arises on the following words in the *habendum* of the deed: "And from and after her decease, that Thomas Parkin and his heirs forever, shall have and possess the said lands and premises; and in case of his, the said Thomas's, death without lawful issue, the said lands shall revert to and be vested in the said Rachel and her heirs forever." It is admitted that Lyde Goodwin, under this deed, took a fee-simple in the lands in question in trust for Rachel Parkin during her life, and that the words before recited would, in a will, create an estate-tail in Thomas Parkin; but, it is objected that those words in a deed will not create an estate tail, and that a fee-simple passed to Thomas Parkin. It is without doubt that the above words in a will would give a fee-tail, because no technical words being necessary to create such estate. The intention expressed by the words of the testator must prevail if not inconsistent with some rule or principle of law; and the intention is plain here that Thomas Parkin was to take a fee-tail.

In a deed or conveyance of a freehold or legal estate, technical words are appropriated by law to the creation or limitation of particular estates; for instance, to create an estate in fee, the limitation must be to J. S. and his heirs, and to create a fee-tail, to J. S. and the heirs of his body. It is established that the words *de corpore suo* are not indispensably necessary, but may be supplied by words equipollent or tantamount, plainly designating or pointing out the body from whom the heirs inheritable are to issue or descend. In this case, the limitation is to Thomas Parkin and his heirs, and in case of his death without lawful issue, to revert to Rachel Parkin and her heirs. These words are comprehended in one sentence, and contain the two requisites necessary to constitute an estate-tail. The subsequent words, "in case of his death without lawful issue," qualify and restrain the generality of the precedent expressions

(to Thomas Parkin and his heirs), and point out unequivocally and plainly the heirs intended to inherit, and confine them to heirs of his body. Thomas Parkin could not die without heirs as long as he had lawful issue; and in this case the words lawful issue, heirs of his body, and issue of his body, as words of limitation, expressive of the quality of the estate to be granted, are of the same import and signification, and necessarily designate the heirs intended to inherit, and do convert the fee-simple created by the first words into a fee-tail; for Thomas Parkin could not have issue or lawful issue, but of his body.

The court being of opinion that an estate-tail vested in Thomas Parkin, with the reversion in fee to Rachel Lyde Parkin, under the deed; and being also of opinion that the said words, in a conveyance of a freehold estate, would create a fee-tail, it becomes unnecessary to decide the question, so ably and learnedly discussed by the counsel, how far the court is at liberty, in expounding a deed of conveyance creating or limiting an use or trust at common law, and not united to the possession by the statute of uses, to reject the rules established by the common law in the construction of a conveyance of a freehold estate, and to give an exposition according to the intention of the parties, as in a will. It is also unnecessary to decide on the nice and refined distinctions between trusts executed and executory; and the court give no opinion on those questions.

As to the operation of the deed of 1796. It is unquestionable that a *feme covert* cannot transfer or pass her interest in land to another, unless by fine, common recovery or deed executed and acknowledged according to the mode prescribed by the act of 1715; and the question to be decided by the court is, whether the acknowledgment of the deed by Mrs. Hollingsworth is conformable to the said mode, and effectual to render the deed operative in law to convey her interest in the lands in dispute to her son, Thomas Parkin. The court are of opinion that the acknowledgment is substantially defective, the word "fear" being omitted in the certificate of the acknowledgment, and no word of similar import or meaning substituted in its place. The word fear, in that part of the certificate, means a particular, specific kind of fear, and signifies that she makes her acknowledgment without being induced thereto by fear of ill-usage by her husband. The true and genuine meaning of the words, "without being induced thereto by fear or threats of, or ill-usage by, her husband," being fear of ill-usage, threats of ill-usage, or actual ill-usage. The court, in thus giving their

opinion, do not decide that a literal adherence to the form of the certificate is essentially requisite, and that the omission of words deemed essential, cannot be supplied by the substitution of words equipollent or of similar import and signification. But the court are of opinion that the deed is rendered valid and effectual to pass the land mentioned therein to Thomas Parkin, in fee-simple, by the act of assembly, entitled "An act for quieting possessions, and securing and confirming the estates of purchasers," passed at November session, 1807, ch. 52, it appearing by the certificate of the acknowledgment of Rachel Hollingsworth, that she made her acknowledgment privately and willingly, out of the presence and hearing of her husband.

As to the question whether the present bill can be sustained. The decree of the chancellor is subject to his control, only upon a bill of review, or a bill in the nature of a bill of review. A bill of review lies after the decree is signed and enrolled. A bill in the nature of a bill of review lies after the decree is made, but before enrollment. A decree must be considered as enrolled after it is signed by the chancellor and filed by the register. A bill of review will lie only for two causes: error apparent on the decree; or for some matter relevant, existing at the time of the decree, and discovered since. Nothing appears on the proceedings on the first bill to support the position that there is error apparent on the decree, the deeds not being made a part of the proceedings. It cannot be supported for matter existing at the time of the decree and discovered since, without affidavit of such matter, and the existence of it at the time of the decree to lay the foundation for applying to the chancellor for his leave to file a bill of review, and obtaining such leave. On petition suggesting such matter, supported by affidavit as the ground for filing a bill of review, the chancellor exercises his judgment on the propriety of interfering or meddling with the decree for the cause disclosed, and grants or rejects the application accordingly. These requisites for laying the foundation for the present bill, not having been complied with, the court are of opinion that the decree of the chancellor, dismissing the bill, be affirmed, with costs to the appellee.

Decree affirmed.

RUTTER v. BLAKE.

[2 HARRIS & JOHNSON, 353.]

WARRANTY ON SALE.—If a seller of goods affirms them to be of a particular quality, and the buyer receives them upon the credit of such affirmation, and they afterwards appear to be of a different quality, the purchaser may return the goods and recover back the money had and received; or he may have his action without a return of the goods, if he gives notice to the seller where they are deposited. And the same rule exists where there is a warranty of soundness.

APPEAL from the county court. The appellee brought an action of *assumpsit* against Rutter on a promissory note drawn by him and E. Rutter, whom he survived, payable sixty days from date, to Johnson or order, by him indorsed to McCreery, who indorsed it to Blake. General issue pleaded. The defendant read in evidence a stipulation made between him and plaintiff; whereby it was agreed that the note was given for goods purchased of the plaintiff by T. & E. Rutter, deceased; and that defendant might inquire into the consideration of the note, and avail himself of the want of a part or whole thereof, as fully as he could have done had Blake been the original payee. Defendant then offered to prove that T. & E. Rutter purchased of plaintiff three bales of blue guerrahs, and gave in payment the note secured by the indorsements; that T. & E. Rutter did not examine the goods at the time of the sale, nor previous to their arrival in the West Indies, where defendant had shipped the goods, and sold them on their account; that the three bales were not blue guerrahs, but goods of an inferior and different quality; that T. & E. Rutter had sustained loss, by reason of plaintiff's false representation and warranty in the sale of the goods.

The plaintiff's counsel then prayed the opinion of the court, that there should be no reduction in the amount of the note by reason of the matters stated.

By Court, RIDGELY, C. J. Generally, in the sale of goods, if the seller affirms them to be of a particular quality, and the buyer receives them upon the credit of this affirmation, and they afterwards appear to be different from what they were affirmed to be, the purchaser may return the goods and recover back the money, in an action for money had and received, or he may even have his action without a return of the goods, if he give notice to the seller where they are deposited. As, where A. sells a horse to B., affirming him to be sound, B. receives the horse, and

sets out on a journey, but finds the horse to be unsound, and leaves him on the road, he may recover back the money he paid for him in an action for money had and received, if he gives notice to the seller where the horse is, and he is not bound to return the horse. It was the conduct of the seller that was the original cause of the horse being at a distance and out of his possession, and he must put up with the loss and inconvenience. So, if a merchant in Baltimore buys goods, the seller warranting them to be of a particular description of quality, and the merchant, without examining, sends them to the West Indies, where upon opening he finds them not to be of the quality warranted, he may store them, give notice to the seller, and recover back the money paid for them in an action for money had and received; or he may bring his action on the special agreement of warranty, and recover damages for the full amount of the injury he has sustained; nor is he obliged to return the goods or put himself to any further expense or trouble about them. This, I take it, was exactly the defendant's situation when the goods arrived in the West Indies. He had his option to do one of two things: 1. To refuse to keep the goods, declining to go on with the purchase; or, 2. To accept the goods in lieu of those sold him, and to confirm the purchase by going on to sell them and receiving the amount of sales. What does he do? Why, he adopts the latter of the two alternatives. He sells the goods and receives the money; not as agent for the seller, that is not intended, but upon his own account. This mode of proceeding by the defendant, however hard it bears upon him, I am of opinion, has deprived him of a remedy here upon the warranty. Let us suppose that A. sells a horse to B., with warranty that he is sound. B. receives the horse, and riding him home discovers him to be unsound, and says nothing of this to A., but sends the horse to vendue, and sells him for half what he gave for him. Here he has elected to abide by his contract, and I take it, can never resort to the original seller to make good the difference of price. I think the cases I have put are similar to the case before the court, and that the warranty, if any made, cannot avail the defendant so as to entitle him to a deduction of the warranty for any damage or loss by him sustained. Suppose the plaintiff had received the goods on sale, with warranty to him, and has paid the amount; if he does not recover of the defendant, neither can he recover of the person who sold them to him; the defendant has put it out of the plaintiff's power; for the defendant having sold the

goods, the plaintiff cannot return them, or give notice to the person who sold them to him where they are. Therefore, it may be that the plaintiff paid the price of first quality goods; and if he should not be permitted to recover against the defendant, he will lose the difference of price between goods of the best and goods of inferior quality. Whereas, had the goods not been disposed of by the defendant, the plaintiff could have returned or given notice where the goods were stored, and recovered over from the person who sold to him. It is true, that if at the time of making this note, any particular agreement or understanding took place between the plaintiff or his agent McCreery, and the defendant, that a deduction should be made on account of any defect in the goods, that the defendant has his remedy in equity by making them parties, or in this court, if he can prove the note was delivered with such intention or understanding of the parties.

The defendant excepted, and the verdict and judgment being against him, he appealed.

W. Dorsey, for the appellant.

Purviance and S. Chase, Jr., for the respondent.

The case was submitted without argument.

Judgment affirmed.

See *Miller v. Grove*, 18 Md. 244, where this case was cited and approved.

SHEELY v. BIGGS.

[2 HARRIS & JOHNSON, 363.]

ACTIONABLE WORDS—FALSE SWEARING.—To make the word “forsworn” slander, it must be introduced by a *colloquium* setting forth some judicial proceeding in which the party was sworn. Hence, in an action for slander where the words charged were that “he the said J. swore false and swore to a lie,” “*innuendo* meaning that the said J. had taken a false oath before a magistrate;” it was held not to be actionable.

OFFICE OF AN INNUENDO.—The office of the *innuendo* is to explain doubtful words where there is matter sufficient in the declaration to maintain the action; but if the words in themselves are not actionable, their meaning cannot be extended by the *innuendo* to make them actionable.

SLANDER. In the first count, Biggs charged Sheely with having spoken and published concerning him, the following false, scandalous and malicious words, viz: “He (meaning the

plaintiff) swore false and swore to a lie," meaning that the plaintiff had committed perjury; that he had taken a false oath before a magistrate. The second count charged defendant with uttering these words to other citizens: "He (meaning the plaintiff) had sworn false, and would, if he did not take care, lose his ears for it;" meaning that the plaintiff committed perjury before a magistrate. Upon the general issue pleaded, a verdict was given for the plaintiff for twenty-two pounds seventeen shillings and six pence.

The defendant moved in arrest of judgment: because the words charged were not actionable; because the words are laid in the various counts to have been spoken by defendant of and concerning plaintiff; because there is no *colloquium* set forth. The motion was overruled and a judgment rendered in favor of the plaintiff; whereupon defendant appealed.

Taney and F. S. Key, for the appellant, relied upon *Holt v. Scholefield*, 6 T. R. 691.

Shaaff, contra, cited 6 Bac. Ab. tit. Slander, B. 3; and *Gurneth v. Derry*, 3 Lev. 166.

By Court, CHASE, C. J., BUCHANAN, NICHOLS, and GANTT, JJ., concurring. There are some principles well established in actions of slander which govern the court in determining this case:

1. No words are actionable unless they impute a crime to the plaintiff, which subjects him to punishment: 3 Bl. Com. 123; *Holt v. Scholefield*, 6 T. R. 691, 694.

2. The office of the *innuendo* is to explain doubtful words where there is matter sufficient in the declaration to maintain the action; and if the words in themselves are not actionable, their meaning cannot be extended by it to make them actionable: *Holt v. Scholefield*, 6 T. R. 694.

3. If the words may be understood in a sense not criminal, there must be a *colloquium* in the introductory part to show they were spoken in a criminal sense, or they are not actionable.

The word forsworn, although in one sense it may import perjury, yet it does not necessarily imply it; for a person may be forsworn without committing perjury; and no extrinsic aid can be derived from the *innuendo*, to give the words a criminal meaning. If the words before the *innuendo* do not import slander, no words produced by the *innuendo* will make the action maintainable. It is not the nature of an *innuendo* to

beget an action. Forsworn, by itself does not import slander; otherwise of the word perjured: *Core v. Morton*, Yelv. 27; *Holt v. Scholefield*, 6 T. R. 694. To make the word forsworn slander, it must be introduced by a *colloquium*, setting forth some judicial proceeding in which he was sworn: *Core v. Morton*, Yelv. 27. The words in the declaration charged to have been spoken are, that "he, the said Jacob, swore false, and swore to a lie." The subsequent words, "meaning that the said Jacob had committed perjury, that the said Jacob had taken a false oath before a magistrate," are part of, and come under the *innuendo*. The question is, whether these words are actionable, and it is admitted, if they are not, the judgment must be arrested, there being one defective count in the declaration; a general verdict and entire damages having been given.

The court are of opinion they are not; and that the judgment of the county court be reversed, and judgment on the verdict be arrested.

Judgment be reversed.

See *Hopkins v. Beedle*, 2 Am. Dec. 191.

BRYDEN v. TAYLOR.

[2 HARRIS & JOHNSON, 396.]

RECORDS OF FOREIGN NOTARY AS EVIDENCE.—The minutes of the proceedings of a foreign notary public in protesting a bill of exchange are to be considered as records by the courtesy of nations, and a copy of such minutes under the hand and notarial seal of the notary, is sufficient evidence of the protest of a foreign bill of exchange for non-acceptance.

EVIDENCE TO CHARGE ONE AS PARTNER. — Where a defendant proved that a person was frequently seen in the counting-house of the plaintiff, transacting business as a principal, and was generally supposed, believed and understood to be a partner in the house of the plaintiff, which was carried on in the name of the plaintiff only; it was held that the evidence was not sufficient to prove that such person was a partner of the plaintiff.

ERROR from the general court. Taylor brought an action of *assumpsit* against Bryden as indorser of a foreign bill of exchange, drawn by Bescke of Baltimore on merchants in London. On the trial, plaintiff, to prove notice to defendant of non-acceptance and non-payment, produced a certified copy of the deposition of W. O. Payne, acting as plaintiff's clerk, from which it appeared, that he received letters directed to Taylor

during the latter's absence from Baltimore, which contained notice of the protest of the bill for non-acceptance; that immediately he notified Bryden thereof; that some time after, immediately upon receipt of intelligence from London that the bill had been protested for non-payment, deponent by order of Taylor, gave notice to Bryden thereof; and subsequently heard conversations between Taylor and Bryden on the subject.

This deposition had been taken before Owen Dorsey, upon notice given to Bryden twenty days prior thereto. The deposition was duly recorded, but it did not appear from its face that Dorsey was a justice of the peace. Plaintiff gave evidence that Payne was deceased. Defendant objected to the reading of this deposition.

CHASE, C. J. The court accede to the principle that special authorities must be strictly pursued, but they are of opinion that it appears upon the face of the deposition that it has been properly taken. The court are of opinion that the act of assembly of July 1779, ch. 8, entitled "an act establishing a mode to perpetuate testimony," does not require an efficient residence, such as would make a person a domicile, qualify him to vote, or to be capable of holding an office; but a temporary or transient residence is sufficient; and it appears to the court that the requisites of the said act of assembly have been complied with. The witness being in the country at the time the deposition is taken is alone necessary; unless it were so, no person but a judge of the general court would be competent to take the testimony of transitory witnesses. The twenty days notice is not only for the purpose of giving the opposite party time to appear, but to inquire into the character of the witness. The act of assembly does not require the fact of residence to be put upon record. The defendant excepted.

To that portion of the deposition which stated that deponent, as clerk of the plaintiff, received letters addressed to plaintiff stating the protest in consequence of which he gave notice to defendant, defendant objected.

CHASE, C. J. That part of the deposition is only inducement. Let it be read.

The plaintiff offered also a certified copy of the minutes of the notary public by whom the bill had been protested in London for non-acceptance. Defendant objected.

CHASE, C. J. The court are of opinion that the minutes of the proceedings of a notary public are to be considered as rec-

ords under the courtesy of nations; and that a copy under the hand and notarial seal of the notary is sufficient evidence of the protest of a foreign bill of exchange for non-acceptance. If none but the original would be evidence, what a situation would the party be in where there are different indorsers in different countries. In such cases copies must be sent, and they are always received as evidence. The defendant excepted.

To prove that at the time of drawing and indorsing the bill, Taylor was in partnership with John Taylor, under the firm name of William Taylor, John being a dormant partner; defendant gave in evidence that John was frequently seen in the counting house of William Taylor, transacting business, receiving applications, and giving answers as a principal in the business, and was generally supposed and believed to be a partner. It appeared that for several years prior to the making and indorsement of the bill, John Taylor had resided in London, doing business under the name of John Taylor & Co.; that at the time of the drawing and indorsement he had come over from London in bad health, and remained in this country but twelve or eighteen months; that William did then, and for a long time before and afterwards, carry on business in his own name alone. Defendant requested the court to instruct the jury, that if John Taylor was, at the time mentioned, a partner in the house of William Taylor, then plaintiff can not recover in this action.

CHASE, C. J. The court are of opinion that the evidence offered is not sufficient to prove that John Taylor was a partner of the house of William Taylor, and therefore they refuse to give the direction prayed. The defendant excepted.

A question arising as to the value of the sum of money mentioned in the bill:

The COURT said that it had been often decided in this court, under the act of 1785, ch. 38, that the plaintiff is to recover as much money as will purchase a similar bill at the time of the verdict.

The verdict and judgment being for the plaintiff, the defendant brought the present writ of error.

Harper and Purviance, for the plaintiff in error, cited *Evans v. Bonner*, 2 H. & McH. 377; *Gordon v. Hickman*, 4 Id. 217, and various acts of assembly.

Martin, for the defendant, cited *Gittings v. Hall*, 1 H. & J. 18 (2 Am. Dec. 502); *Ex parte Bollman*, 4 Cranch, 75; *Walrond v. Van Moses*, 8 Mod. 322, 323.

The Court, POLK, BUCHANAN, NICHOLSON and EARLE, JJ., were of opinion, that there was no error in the opinion expressed by the general court in the several bills of exception.

Judgment affirmed.

DORSEY v. GASSAWAY.

[2 HARRIS & JOHNSON, 402.]

ADMISSIONS OF COUNSEL AS EVIDENCE.—Admissions of counsel of certain facts in a special verdict taken at a former trial between the same parties in the same action, are not evidence in a new trial of the same cause.

PROOF OF CONTENTS OF LOST DEED.—Where a deed is lost, or is not in the power of a party to produce it, it is only necessary to show an exemplified copy, or prove the contents of the deed.

PROCEEDINGS IN CHANCERY AS EVIDENCE.—Proceedings in chancery, under an insolvent law, are not evidence in favor of the person who had obtained the benefit of that law, to prove an acknowledgment and admission by him on his application for the benefit of the law. A bill in chancery with all the proceedings and decree thereon, cannot be read in evidence in an action between parties other than those named in the proceedings. An answer in chancery, made by the respondents from information derived from the present defendant, is not admissible in evidence; but the declarations of the defendant are admissible evidence, and a witness may refer to the answer to refresh his memory as to the declarations made to him by the defendant.

SUBSEQUENT TITLE OF VENDOR AVAILABLE TO VENDEE.—A mortgage of slaves subsisted when the mortgagor, claiming full title, sold them for a full consideration; though as to the mortgagee, the sale transferred only an equitable interest; yet, as between the vendor and vendee, the sale passed the absolute title to the vendee, and therefore, when subsequently the mortgagor obtained his discharge under the insolvent law, and purchased the slaves from the mortgagee, the title thus acquired will inure to the benefit of the vendee.

APPLICATION OF PAYMENTS.—Payments made by a mortgagor are not to be applied to discharge a debt due on the mortgage in favor of a purchaser of part of the property mortgaged, who had not paid for it, and who had made a gift thereof to his son to defraud his creditors.

DAMAGES IN REPLEVIN.—In an action of replevin the jury may give such damages as they think the plaintiff is justly entitled to, as an equivalent for the injury sustained.

APPEAL from the general court. Gassaway brought replevin against Dorsey to recover two negro slaves, James and Harry. Pleas *non cepit* and property. The cause now came before the court for a new trial, the defendant having recovered judgment in the original action.

The defendant offered in evidence the admissions of plaintiff.

iff's counsel in the special verdict taken at the former trial, to prove the existence of a mortgage therein stated.

Mason, for the plaintiff, objected, citing *Mahoney v. Ashur*, 4 H. & McH. 295, 322.

CHASE, C. J. Facts are often admitted and stated for the purpose only of bringing a particular point of law before the court. As the finding of the jury in the special verdict was on the admissions of counsel, it is not evidence to prove the existence of the mortgage.

Defendant offered in evidence a bill of sale for the negroes mentioned from Clerke, Russell's administrator, to E. Dorsey, one of the original defendants in this action. Plaintiff objected to its being read, unless the execution be proved.

CHASE, C. J. If the negroes remained in the possession of the vendor, the bill of sale is required to be recorded; and whether the negroes remained in the possession of the vendor, is a matter of fact for the jury; and if they find they were not in possession of the vendor, then the bill of sale is not evidence, although it has been recorded without proof of its execution; it not, in such case, being a paper authorized by law to be recorded.

I. Plaintiff gave in evidence that in 1772, defendant sold at public sale a number of negroes, and that at this sale plaintiff's father became the purchaser of the negroes James and Rachel, the mother of Harry; that James and Harry were given by his father in 1789, to plaintiff, who held possession of them until 1796, when they were taken from him by defendant.

Defendant, to lay a foundation for proving that a deed of mortgage for certain negroes, was executed by him to Russell in 1763, under which the defendant claimed the negroes in the present suit, offered in evidence to the court by the testimony of Young, that he, Young, was Russell's agent in America, and as such, had been in possession of a mortgage of certain negroes, executed by the defendant to Russell, bearing date in 1763; that he well knew defendant's handwriting, and that the mortgage was signed by him; that it was an original paper; that he delivered it ten or twelve years ago to Clerke, the administrator of Russell, who had died about the year 1789; that all the papers relating to Russell's claim against defendant, which Young had delivered to Clerke, were by him delivered over to Cooke to prosecute the claim before the commissioners in Philadelphia. Defendant further offered the de-

position of Cooke, which, after stating the receipt of the papers from Clerke, set forth that pending an action for the recovery of Russell's demands, E. Dorsey applied to him, Cooke, for the purchase of sundry negroes mentioned in the mortgage, and after a valuation by disinterested persons, he sold the negroes to E. Dorsey, and received from him, or from some other person on his behalf, the purchase-money therefor; that deponent withdrew the original papers which he filed in the suit, and presented them to the commissioners, in order to obtain compensation for the money paid into the treasury by John Dorsey towards satisfying certain mortgages and bonds; that whatever papers were placed in the possession of the commissioners were taken by them to Great Britain, where they now are, as deponent believes.

As evidence of the original mortgage from Dorsey to Russell in 1763, defendant offered to read to the court the *inspeximus* of the deed found on the records of the court, dated December 6, 1763; and the marginal entry in the record book, stating the deed to have been examined.

Mason, Shaaff and Johnson, for the plaintiff, objected, and cited: 1 Morg. Ess. 159, 160; *Page's case*, 5 Co. 54; *Style*, 445; *Trials Per. Pais.* 355, 434; *Eden v. Chalkill*, 1 Keb. 117; *Cheney v. Watkins*, 1 H. & J. 527 (2 Am. Dec. 530); *Peake's Evid.* 97, 110; *Bull. N. P.* 255, 256.

Martin, attorney-general, and Key, for the defendant, cited *Hall v. Gittings*, 1 H. & J. 14 (2 Am. Dec. 502); *Peake's Ev.* 96; 1 Morg. Ess. 161.

CHASE, C. J. The question before the court now, is different from what it was on the former trial. Here the defendant has laid a foundation whereon to authorize the *inspeximus* of the deed to be read; and the question is, what other kind of evidence will be sufficient for that purpose? Where a deed is lost, or not in the power of the party to produce it, it is only necessary to show an examined copy, or prove the contents of the paper. The court consider the *inspeximus* in this case to be a true copy. The clerk had authority to record the deed as to the real estate, and the copy is good as to the real estate. If it is a true copy as to the land, it is equally so as to the personal estate. The court consider it the next best evidence to the deed itself, and far preferable to parol proof. This case is distinguishable from that of *Cheney v. Watkins*. In that case there was no question about the *inspeximus* of the deed, that the

court recollect of. In the case of *Gittings v. Hall*, it was the *insperimus* of an ancient deed which needed no recording, and where the clerk had no authority to record it; but as the possession had gone with the deed, it was on those two grounds read. The court are of opinion, that the *insperimus* of the deed of mortgage from the defendant to James Russell, is legal evidence, and admit the same to be read in evidence to the jury. The plaintiff excepted

II. Defendant then read in evidence his affidavit, dated May 18, 1781, on file in the treasury, and an entry in the treasurer's books, to prove that he had made a payment into the treasury on account of a debt due from him to Russell; and offered to read the proceedings of the court of chancery, to prove that he had taken the benefit of the insolvent act; and that in 1797, Moncrieff, as the surviving assignee in bankruptcy, commenced suit against the elder Gassaway. He also offered to read the proceedings of the court of chancery in 1797, of said Gassaway's having taken advantage of the insolvent act, in order to prove that he had never paid any consideration for the negroes prior to the voluntary gift to his son, the plaintiff, nor at any time since.

CHASE, C. J. The court refuse to admit the above facts to be given in evidence to the jury, to prove that Thomas Gassaway never paid any consideration for the negroes before his voluntary gift of them to his son, the plaintiff, nor at any time since; the court being of opinion, that the acts and declarations of the defendant in this case, subsequent to the sale by him to Thomas Gassaway, and whatever was consequent thereon, are not evidence to defeat the claim of the plaintiff. But the court are of opinion, that the affidavit and payment into the treasury by the defendant in 1781, prior to the sale by him to Thomas Gassaway, are admissible evidence to prove the defendant was indebted to James Russell, and made the payment into the treasury in the manner therein stated. The defendant excepted.

III. Defendant then read the affidavit and entry, and the proceedings in chancery on his application under the insolvent act, to prove admissions of defendant in 1787, that his debt to Russell on the mortgage of 1763, was then outstanding, and asked the direction of the court that this evidence was competent against Gassaway.

CHASE, C. J. The court reject the evidence. Defendant excepted.

IV. To prove that the mortgage was satisfied by defendant prior to the revolution, the plaintiff offered the records of a proceeding in chancery instituted by Clerke, Russell's administrator, against Martin, Buchanan, Moncrieff, R. and W. Dorsey. Defendant objected.

CHASE, C. J. The proceedings are between different parties, and, therefore, cannot be used as evidence in this case. If the decree had been that the mortgage debt was unsatisfied, it could not be used against the plaintiff, and the rule must be mutual. Although the answer is in the handwriting of the defendant, yet he may have only acted as a clerk. He has not himself sworn to it. The court refuse to let the proceedings be read to the jury for the purpose required by the plaintiff's counsel. Plaintiff excepted.

V. Plaintiff offered the testimony of R. Dorsey to show that he with Moncrieff and W. Dorsey appeared as the trustees of defendant in the suit brought by Clerke, and filed the answer to that bill; that he obtained his knowledge of the facts set forth in the answer from this defendant and from his books, and that the answer is in defendant's handwriting.

CHASE, C. J. The court are of opinion that the declarations of the defendant are evidence admissible to the jury, and that the witness may recur to the answer to refresh his memory as to the declarations made to him by the defendant. But the court refuse to allow the answer to be read in evidence to the jury. Plaintiff excepted.

VI. Plaintiff offered to prove that the negroes purchased of Cooke by E. Dorsey were paid for with the money of defendant, and that defendant is the only one claiming under such purchase.

Defendant then offered in evidence the proceedings under the insolvent act, to prove that he obtained the benefit of that act between 1782, when he sold the negroes to Gassaway, the elder, and 1796, when he purchased their descendants, the negroes in this action, as he asserts, from E. Dorsey.

CHASE, C. J. The defendant cannot be permitted to disaffirm his own sale. He cannot be suffered to set up his discharge under an insolvent law to disaffirm his prior acts. The court are of opinion that if the jury find the mortgage was satisfied in the year 1782, when the defendant sold the negroes to Thomas Gassaway, that the plaintiff has a good title to them.

The court are also of opinion that if the mortgage was subsisting in 1782, and the defendant sold the negroes, claiming the absolute ownership in them, and for a full consideration, although as to James Russell, his sale would transfer only the equitable interest in the negroes; yet, as between the vendor and vendee, the operation of the contract would be to pass the absolute ownership in the negroes to the vendee, and according to good faith and honesty, the subsequent acts of the defendant in perfecting his title to the negroes, will inure in law to confirm and not to defeat his contract with Thomas Gassaway. Defendant excepted.

VII. Plaintiff then offered evidence to show that between 1763 and 1776 defendant had made payments to the amount of three thousand nine hundred and fifteen pounds eighteen shillings and two pence, to Russell's administrator, which defendant claimed to apply to the satisfaction of the mortgage, and prayed the direction of the court to the jury, that if they were satisfied that the sums had been so paid, and there was no evidence establishing that the payments were applied to any particular debt, then the law will apply them to the satisfaction of the mortgage.

CHASE, C. J. There can be no doubt but that the law will apply the payments to the satisfaction and discharge of the mortgage. The court give the direction prayed. Defendant excepted.

VIII. Defendant then prayed the court to direct the jury, that his declarations since the sale to Gassaway, and since his insolvency, cannot be used in evidence to the injury of Russell's interest, or that of any one claiming under him.

CHASE, C. J. The court are of opinion that the declarations of the defendant are evidence against him. Defendant excepted.

IX. Defendant then prayed the direction of the court, that the principle, that the law would apply the payments in satisfaction of the mortgage, should be carried into effect in favor of *bona fide* purchasers, and not in favor of the plaintiff, whose father had not paid for the negroes purchased him.

CHASE, C. J. The court are of opinion that the payments made by the defendant to Russell, if the jury shall find they were made as stated, ought to be applied to the discharge and satisfaction of the mortgage in favor of the plaintiff, unless the

jury shall find that Thomas Gassaway made the gift to his son, the plaintiff, to defraud his creditors. Defendant excepted.

X. Defendant further prayed the direction of the court to the jury, that unless they are satisfied that the mortgage money was satisfied before the sale made by the defendant, or that the plaintiff or his father had paid the purchase money to some one entitled to receive the same, then nominal damages only were recoverable: 3 Bac. Ab. tit. Grant, D. 382; *Walker v. Constable*, 1 B. & P. 306; *Moses v. Macferlan*, 2 Burr. 1005; Esp., N. P. 101.

CHASE C. J. The jury may give what damages they think the plaintiff is justly entitled to as an equivalent for the injury sustained. The court are of opinion that it is within the province of the jury to ascertain and fix the *quantum* of damages, as an equivalent for the use of the negroes, according to what they may think right on consideration of the evidence; and that they are not restrained by any principle of law operating on this case, from the full exercise of their judgment. Defendant excepted.

Verdict and judgment for the plaintiff.

On an appeal taken by the defendant to this court, the question arising under the 2d, 3d, 6th, 7th, 8th, 9th and 10th bills of exception, were argued by:

Martin, for the appellant.

Johnson, attorney-general, for the respondent.

The Court, POLK, BUCHANAN, NICHOLSON and EARLE, JJ., concurring, agreed with the general court in the opinions expressed in the several bills of exceptions taken on the part of the defendant in that court.

Judgment affirmed.

WILLIAMS v. HODGSON.

[2 HARRIS & JOHNSON, 474.]

BOND BY ONE PARTNER FOR FIRM DEBT.—A bond given by one partner for a simple contract debt due to a creditor of the firm, and accepted by him, is in law a release of the other partner, and an extinction of the simple contract debt at law and in equity.

SAME.—Such a bond, although not binding on the party who does not join in its execution, is, however, obligatory on the one executing it.

IGNORANCE OF LAW NO GROUND FOR RELIEF.—Ignorance of the law, as to the legal effect of accepting the bond of one partner for a simple contract debt due by the firm, is not a ground for relief in equity.

APPEAL from the court of chancery, where a bill was filed by Hodgson against Williams and one Clarke, who were charged as partners under the name of John Clarke & Co. During the partnership it was alleged Clarke bought goods from the complainant, which were delivered to him on the credit of the firm. On the seventh July, 1797, Clarke settled with the complainant, giving a bond in the name of Clarke and Williams, but signed by himself alone, for the amount due. On the eighteenth of November, 1797, the complainant received for goods sold, another bond signed in this manner. Clarke became insolvent. The bill stated that suits were brought on the bonds, in the general court, against Williams, and were discontinued because the court held that one partner could not execute a bond so as to bind in law his co-partner, unless by a special authority. A discovery was prayed from the defendants, whether they were partners or not, and that they may be compelled to account with and pay the money due to the complainant; and other relief was asked. The answer of Williams stated that he and Clarke entered into partnership in October, 1795, in the milling and distilling business, for three years. Clarke was directed not to purchase merchandise on Williams's account, and he believes that Clarke sold goods on his own account. He was not aware whether or not Clarke bought goods on the partnership account, but if so, he insisted he was not liable. He knew nothing of the settlement or execution of the bonds. The partnership was dissolved in 1798. Clarke was the acting partner, but he (Williams) never bought any goods on the firm account, and does not know the consideration of the bonds.

Clarke's answer admitted the facts alleged in the bill.

KILTY, chancellor at February term, 1806, gave his opinion. He first considered whether equity had jurisdiction in the case, and decided that enough had been shown to warrant the interposition of a court of equity. He then says: Without stating particularly the evidence in the cause, the chancellor is satisfied of the existence of the partnership, as alleged by the complainant, and of the liquidation of the balance due for the goods sold, the execution of the bonds as stated, and the result of the suits on them. With regard to the answer of the defendant, Clarke, it is considered that the partnership being proved by other testimony, his admissions are evidence in the same manner as his acts would be in the exercise of the joint business of the firm. And it may here be observed that the responsibility of one partner for the acts of another, is not, as stated by the

defendant's counsel, a principle of sheer mercantile law, but is founded in justice and necessity, and is inseparable from the nature of partnership transactions. It appears that Clarke executed the bonds with a view of ascertaining, and perhaps of securing, in some degree, the balance due for goods sold to the company; and these bonds were taken by the complainant from a misapprehension or ignorance of their legal effect. If notes had been given by Clarke, without seal, as in the case of Riddle (who brought suit against the firm and recovered), and the partnership had been proved, they would have been obligatory on the defendant, Williams, at law. The bonds cannot be considered, in equity, as less solemn and obligatory than the notes; but the remedy sought for on the bonds was defeated by what was indeed a sheer principle of law. For if it be proved, as the chancellor conceives it to be, that the defendant, Williams, was liable, and might have been bound by notes, without seal, for the same amount, the defense set up against the bonds was not an equitable or conscientious one.

The chancellor accordingly decreed that the defendants pay to the complainant the sum of one thousand and twenty-three pounds fifteen shillings and sixpence, with interest and costs. From this decree the defendant, Williams, appealed.

Shaaff and Magruder, for appellant, contended there was no legal proof of partnership, that the remedy was at law; but neither at law nor in equity could a recovery be had against the appellant: 1 Harr. Ch. Pr. 36, 41; *Dorsey v. Dorsey*, decided in the court of chancery 1794. They also contended that there was not sufficient proof of the execution of the bonds; that the originals ought to have been produced: Peake's Ev. 96; *Wymark's case*, 5 Co. 74; 2 Com. Dig. tit. Pleader; *De Sobry v. De Laistre*, ante, 535. That the execution of the bonds extinguished the simple contract debt both as to Williams and Clark: Bac. Ab. tit. Release; Buller N. P. 155; Chitty's Plead. 155; *Clement v. Brush*, 3 Johns. Cas. 180; *Pierson v. Hooker*, 3 Johns. 70 (ante, 467); 4 Vin. Ab. 387; 1 Fonbl. 117 n; 2 Com. Dig. tit. Chancery, 476, 330, 831.

Key and Johnson, attorney-general, cited Watson on Part. 40, 337, 458; *Higgins's case*, 6 Co. 46; *Abbott v. Smith*, 2 W. Bl. 950; *Maddox v. Jackson*, 3 Atk. 406; *Darwent v. Wallon*, 2 Id. 510.

CHASE, C. J., delivered the opinion of the court, consisting of CHASE, BUCHANAN, GANTT and EARLE, JJ. The court have consid-

ered the bill, answer and proof, in this case, the arguments of counsel and the decree of the chancellor; and admitting the proof to be sufficient to establish a partnership between Williams and Clarke in the extent charged in the bill, in opposition to the answer of the defendant, and admitting also that the bonds mentioned in the bill as executed by Clarke under the signature of Clarke & Co. have been fully proved, it appears to the court that the complainant is not entitled to any relief in equity, and that the decree of the court of chancery ought to be reversed.

It is a principle recognized by the courts of law and equity, that a bond given by one partner for a simple contract debt due from the partners to the creditor and accepted by him, is, by operation of law, a release of the other partner, and an extinction of the simple contract debt. It is also established by the courts of law and equity that ignorance of the law as to the legal consequence resulting from such a bond, cannot excuse or form a ground for relief in equity, on the suggestion and proof that the party was mistaken as to the legal effects of such a bond, imagining at the time that it could not operate as a release to the other debtor, and that his responsibility still existed.

The court are also of opinion that the bonds set forth in the bill, although not binding on Williams, are obligatory on Clarke. On these grounds, the court decide that the decree of the court of chancery ought to be reversed.

BUCHANAN, J. I consider the partnership alleged in the case to have existed between the defendant below, as sufficiently established to the extent charged in the bill, and that the delivery of the goods and merchandise, said to have been sold to Clarke, as acting partner, is fully proved. But if the bonds, charged in the bill to have been passed by Clarke, in behalf of Williams and himself, were executed by him for the amount of those goods, the simple contract debts were not thereby severed, and continued open as to Williams and destroyed as to Clarke (on whom such bonds would be obligatory), but being respectively joint, they became in law extinguished as to both. And though equity will interpose its aid where a remedy is wanting at law, yet it cannot revive a debt which in law is extinguished. If, however, such a bond could be construed to extinguish a simple contract debt as to the party signing it only, leaving it open as to the other partner for the interposition of a court of chancery; yet in this case the complainant has failed in proof to lay a foundation for a decree against Williams; for, as against

him, the bonds in question, which are set up in the bill as the very ground of the relief prayed for, are not proved by any legal evidence exhibited in the record; and it cannot be seriously contended, that in the absence of such proof, the chancellor could hold jurisdiction over the case; for if no such bonds were executed by Clarke, the simple contract debt remains unimpaired, and the proper remedy is in a court of law. Upon the whole, I am of opinion that the chancellor's decree, however consonant to strict justice, ought to be reversed.

Decree reversed.

CASES
IN THE
COURT OF APPEALS
OF
VIRGINIA.

FITZHUGH v. LOVE'S EXECUTOR.

[6 CALL, 5.]

INDORSEMENT BY ONE NOT A PAYEE.—Where a person not a payee indorsed his name in blank on a bill of exchange without any consideration, and prior to its indorsement by the payee, it was held he was not liable as an indorser, but otherwise if there had been a consideration for the indorsement.

DEBT for the balance alleged to be due on a certain bill of exchange, instituted by Love, the payee, against Fitzhugh and Thornton. The case is stated in the opinion of this court, to which the defendants appealed from a judgment in favor of Love.

Botts, for the appellants.

Warden and Randolph, contra.

TUCKER, Judge. The declaration charges, that Philip Fitzhugh drew a bill of exchange in favor of Samuel Love, or order, on certain persons in Great Britain. That afterwards, on the same day, Presley Thornton, at the special instance and request of the said Philip, and in order to give a credit to the said bill of exchange, and to induce Love to receive it from Fitzhugh, and in consideration of Love's paying to Fitzhugh the value in current money, and actually received by Fitzhugh, did, by his indorsement, made on the said bill, according to the custom of merchants, indorse the same for payment to the said Samuel Love, which was partly paid, and protested for the balance. Whereupon this suit is brought upon the act of assembly. Plea, *nil debet*, and issue. The bill of exceptions states a copy of the bill and protest made by a notary public in Liverpool,

made, as he alleges from the original bill and the protest thereof, made in London; by which it appears, that there was no special undertaking on the part of Thornton, to warrant the payment; but a mere indorsement of his name, prior to that of Samuel Love, in whose favor the bill was drawn. The jury found a verdict for the plaintiff, if the court should be of opinion that the bill of exchange and the copy of the protest (the original appearing to have been lost) are sufficient to support the plaintiff's action.

The question referred to the court by the jury, so nearly resembles that which must have occurred to the court itself upon the declaration, that it may be regarded as, in substance, the same. Which, is this, whether Presley Thornton is an indorser of the bill in the sense and meaning of the custom and usage of merchants, or not?

A bill of exchange may be defined an open letter of request, addressed by one person to a second, desiring him to pay a sum of money to a third, or to his order; or it may be made payable to bearer. The person who makes the bill, is called the drawer; he to whom it is addressed, the drawee; and, if he undertakes to pay it, he is then called the acceptor; the person to whom it is ordered to be paid, is called the payee; and, if he appoints another to receive the money, that other is called the indorsee, as the payee is, in respect to him, the indorser: Kyd's Bills Ex. 3, 4.

Indorsement is a term known in law, which by the custom of merchants, transfers the property of the bill to the indorsee: Cunningh. Bills, 57; 3 Bac. Ab. 609; 4 Bac. Ab. 703.

Bills payable to bearer are transferred by delivery. But to transfer those payable to order, as this bill is, it is necessary, in addition to delivery, that there should be something by which the payee may appear to express his order. This additional circumstance is an indorsement: Kyd, 88.

Every transfer implies a property in the person transferring, or an authority to make it, given by him in whom the property is vested. In this case, it is not pretended that Thornton ever had any property in the bill; nor was he the agent of any person having a property in the bill. He, therefore, was not an indorser according to the custom of merchants.

At the time he wrote his name on the bill, it was incapable of being transferred, but by the previous indorsement of Love, the payee. Thornton was neither drawee nor payee, nor assignee nor indorsee, at that time. His indorsement, there-

fore, was a mere nullity, according to the custom of merchants. Upon every other ground, it was a *nudum pactum*. He received no consideration for warranting the payment of the bill, nor is any legal consideration charged. He was, therefore, not liable for the bill.

The action is joint. The plea is joint. The judgment is joint. It cannot be severed in this action. Thornton, then, not being liable, the judgment is erroneous, and must, I conceive, be wholly reversed. No opinion is therefore necessary as to the validity of the evidence. I shall only say, an attested copy by a notary public in New York or Norfolk, would have been just as good evidence as this copy by a notary in Liverpool, whose attestation, as it respects a bill of exchange on London, and protested there, is perfectly extra-official; and, consequently, no evidence. If the original were lost, why was not an attested copy produced from the office of the notary in London, who made the protest?

FLEMING, Judge, concurred that the judgment ought to be reversed; for the case was not like that of *Call v. Scott*, 4 Call, 402; because there the consideration for the indorsement expressly appeared in the proceedings, and, consequently, the indorsers were clearly liable.

CARRINGTON, Judge. Thornton was neither payee, nor had any interest in the bill; and therefore, he was not an indorser within the meaning of the act of assembly, allowing an action of debt against the indorser; nor was he liable upon the bill in any action, as there was no consideration for the indorsement proved. In which respect it differs from the case of *Call v. Scott*; for, in that case, the consideration for the indorsement appeared in the proceedings; and, therefore, the whole court thought the indorsers liable. Neither Mr. Washington's memorandum of the agreement to change the current money into sterling, nor the notarial copy of the protest ought to have been allowed to go to the jury in this case; and, upon the whole, I think that the judgment is erroneous, and that it ought to be reversed.

LYONS, President. The declaration contains no ground for an action of debt upon the act of assembly against Thornton; for if he had been liable at all, an action upon the case would have been the proper remedy. But he was not liable; for it is not proved that there was any consideration for his indorsement; and, therefore, it is not like the case of *Call v. Scott*;

for, in that case, the consideration appeared in the proceedings. The notarial copy of the copy ought not to have been allowed to go to the jury in the present case; for there is nothing to show that a more authentic copy might not have been procured. I concur that the judgment should be reversed.

What liability one who is not a party assumes who places his name on a negotiable instrument, has been a subject of much discussion in our courts; and our decisions are very conflicting, and even in the same state, the decisions have fluctuated considerably. There must be, by the mere fact of writing one's name on an instrument of this kind, some obligation understood. Is it an obligation of joint-maker or promisor, a guarantor or indorser? Parsons, in his work on Contracts, vol. I. p. 243, refers to indorsement in this manner, and lays it down, that a person who signs his name on the back of a bill or note, at the time of the making, may be held as a joint or several maker; while, if he signs at a subsequent period, he may be held as guarantor. To support this statement, he cites several decisions, and among them four or five New York cases, but which are now entirely inapplicable or overruled, such as *Ellis v. Brown*, 6 Barb. 282; and *Brown v. Curtiss*, 2 N. Y. 225, is not at all in point; for in that case there was an express contract of guaranty. Not one of the cases from the New York reports there cited gives a correct statement of the law as it is now held in that state. It was unquestionably the former view in that state, that a person who wrote his name on the back of a note or bill, was considered either as a joint-maker or a guarantor, and the same view is now held in a majority of our states. This doctrine was advanced in the case of *Herrick v. Carman*, 12 Johns. 159, and more fully affirmed in *Nelson v. Du-bois*, 13 Johns. 175, and in *Campbell v. Butler*, Id. 349. But the doctrine that such an indorser might be a guarantor was undermined in *Dean v. Hall*, 17 Wend. 214, and was finally overthrown in the court of errors in *Hall v. Newcomb*, 7 Hill, 416. This case established the doctrine that such an indorsement can be made available to the payee as such, and so as to hold the party making it as indorser for the benefit of the payee, and that he cannot be liable otherwise than as an indorser. This doctrine was re-asserted in *Spies v. Gilmore*, 1 N. Y. 321, and the old principle finally discarded, that by any implication of law a contract of guaranty could be made out from the mere fact of an indorsement of this kind. The difficulty of this position, to many, was the apparent contradiction that would thus arise from an indorsement like this, of a first indorser being able to sue a second on a negotiable instrument. It was maintained that when a person wrote his name on the back, it was understood that the payee should be a first indorser *ex vi termini*, and that the liability of the person who thus wrote his name was only to a subsequent holder. This difficulty was brought out in *Waterbury v. Sinclair*, 7 Abb. 404; but a way of obviating was suggested by having the payee indorse "without recourse," and taking the indorsement of the party who wrote his name in blank, as the source of his title. This position would seem to have had authority from Lord Kenyon, who impliedly admits that there may be circumstances under which a prior indorser may recover against a subsequent one: *Bishop v. Hayward*, 4 T. R. 470. The doctrine, with its necessary implications and limitations, was fully set forth in *Moore v. Cross*, 19 N. Y. 227, which, on

this point, may be considered a leading case. It was there laid down that an indorser of this kind is liable as such to the payee who received the note on the faith of such indorsement, and that the indorsement by the payee without recourse is a matter of form, which will be implied. Thus the position is now held in New York, one of our leading commercial states, that whether an indorser in this manner will be liable as indorser to the payee is to be determined not so much from the fact of the indorsement, as by the nature of the agreement or contract between them, and for this purpose parol proof may show what the contract or understanding was when the indorsement was made. This was more clearly established in *Meyer v. Hibsher*, 47 N. Y. 279, and *Phelps v. Vischer*, 50 Id. 69. The New England States, as a general rule, hold one who indorses in this manner as a guarantor: *Forsyth v. Day*, 46 Me. 176; *Greathead v. Walton*, 40 Conn. 228. In California he is deemed a guarantor, but a guarantor is entitled to prompt notice: *Ford v. Henderson*, 34 Cal. 673. In Virginia, by a well considered case, he is now held a guarantor: *Watson v. Hurt*, 6 Gratt. 633. See 1 Daniel on Neg. Instr., sec. 707, *et seq.*

A better statement or summary of the doctrine now held cannot be given than by Clifford, J., in a late case in the United States supreme court, in *Good v. Martin*, 95 U. S. 90 (5 Otto), where the cases are ably reviewed, and the various views held by our courts stated. This will hereafter be a leading case, and justifies us giving it at length as a conclusion to this note.

CLIFFORD, J. Decisions of a conflicting character exist as to the nature and legal effect of the obligation which a third person assumes who indorses his name in blank on a negotiable promissory note before the payee and before the instrument is delivered to take effect. Courts of justice, in some jurisdictions, hold that such a party is a second indorser, even though it be true that the payee may never indorse the instrument: *Phelps v. Vischer*, 50 N. Y. 69; *Shafer v. Farmers' and Mechanics' Bank*, 59 Penn. St. 144.

Even elementary rules show that he cannot be first indorser, for the reason that he is not payee; and it is well-settled law that no one but the payee can sustain that relation to the maker, or put the note in circulation as a negotiable instrument: *Essex Company v. Edmunds*, 12 Gray, 272; *Moies v. Bird*, 11 Mass. 436.

* * * * *

Decided cases, almost innumerable, affirm the rule that if one not the promisee indorses his name in blank on a negotiable promissory note before it is indorsed by the payee, and before it is delivered to take effect as a promissory note, the law presumes that he intended to give it credit by becoming liable to pay it either as guarantor or as an original promisor: *Bryant v. Eastman*, 7 Cush. 111; *Benthal v. Judkins*, 13 Met. 265; *Colburn v. Averill*, 30 Me. 310.

Different courts, as remarked in that case, hold different views in respect to the question here involved; but all concur that such an act constitutes a contract, which is to receive a reasonable and an available construction. Great conflict exists in the decided cases; but the better opinion is, that there are certain general rules and principles to be followed in the interpretation of such a contract, which, in the absence of other evidence, will lead to satisfactory results, even amid the conflicting decisions.

Beyond all doubt, the contract should be construed as it was at the time it was made. If made at the inception of the note, it is presumed to have been for the same consideration and a part of the original contract ex-

pressed by the note. If made subsequently to the date of the note, and without a prior indorsement by the payee, it will be presumed that it was not made for the same consideration, and the party, if liable at all, will be regarded as a guarantor. Such a contract to guarantee the debt of a third person must be in writing, and there must be sufficient proof of the consideration: *Brewster v. Silence*, 8 N. Y. 207; *Leonard v. Vredenburg*, 8 Johns. 29; *Hall v. Farmer*, 5 Denio, 484.

These remarks apply where the third person indorses the note before the payee; but, where such a person indorses the note after a prior indorsement by the payee, the law presumes it to have been done in aid of the negotiation of the note, and the party will be regarded as a subsequent indorser, the rule being, that if the indorsement is without date, it will be presumed to have been made at the inception of the note: *Ranger v. Cary*, 1 Met. 369; *Noxon v. De Wolf*, 10 Gray, 343; *Collins v. Gilbert*, 94 U. S. 753.

Irregularities of the kind in the execution of promissory notes are noticed by Judge Story in his work on Promissory Notes, and he says that the maker and such a party are both to be deemed original promisors, and the note a joint and several promissory note to the payee, although as between the maker and the other party they stand in the relation of principal and surety. Standard authorities, too numerous for citation here, are referred to by the author in support of the proposition: Story, Pr., sec. 58; *Sylvester v. Downer*, 20 Vt. 355; *Lewis v. Harwey*, 18 Mo. 74; 1 Parsons, Contr. (6th ed.) 243.

None will deny, it is presumed, that the cases cited sustain the proposition where the third person indorses his name in blank on the note at the time when it was made and before it was indorsed by the payee; and the same learned author admits that the rule would be otherwise if the party actually wrote his name at a subsequent period, unless it was done in compliance with an agreement made before the note was executed: *Hawkes v. Philipps*, 7 Gray, 284; *Leonard v. Wilder*, 36 Me. 265; *Champion v. Griffith*, 13 Ohio, 228. Prior decisions of this court are to the same effect, as appears by the following citation: *Rey et al. v. Simpson*, 22 How. 341.

When a promissory note made payable to a particular person or order is first indorsed by a third person, such third person is held to be an original promisor, guarantor, or indorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place.

1. If he put his name in blank on the back of the note at the time it was made and before it was indorsed by the payee, to give the maker credit with the payee, or if he participated in the consideration of the note, he must be considered as a joint maker of the note: *Schneider v. Schiffman*, 20 Mo. 571; *Irish v. Cutler*, 31 Me. 536.

2. Reasonable doubt of the correctness of that rule cannot be entertained; but if his indorsement was subsequent to the making of the note and to the delivery of the same to take effect, and he put his name there at the request of the maker, pursuant to a contract of the maker with the payee for further indulgence or forbearance, he can only be held as guarantor, which can only be done where there is legal proof of consideration for the promise, unless it be shown that he was connected with the inception of the note.

3. But if the note was intended for discount, and he put his name on the back of the note with the understanding of all the parties that his indorsement would be inoperative until the instrument was indorsed by the payee, he would then be liable only as a second indorser, in the commercial sense,

and as such would clearly be entitled to the privileges which belong to such an indorser.

Considerable diversity of decision, it must be admitted, is found in the reported cases where the record presents the case of a blank indorsement by a third party, made before the instrument is indorsed by the payee and before it is delivered to take effect, the question being whether the party is to be deemed an original promisor, guarantor, or indorser. Irreconcilable conflict exists in that regard; but there is one principle upon the subject almost universally admitted by them all, and that is, that the interpretation of the contract ought in every case to be such as will carry into effect the intention of the parties, and in most cases it is admitted that proof of the facts and circumstances which took place at the time of the transaction are admissible to aid in the interpretation of the language employed: *Denton v. Peters*, Law Rep., 5 Q. B. 475. Facts and circumstances attendant at the time the contract was made are competent evidence for the purpose of placing the court in the same situation, and giving the court the same advantages for construing the contract which were possessed by the actors: *Cavazos v. Trevino*, 6 Wall. 773.

Courts of justice may acquaint themselves with the facts and circumstances that are the subjects of the statements in the written agreement, and are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described: *Shore v. Wilson*, 9 Cl. & Fin. 352; *Clayton v. Grayson*, 4 Nev. & M. 602; Addison Contr. (6th ed.) 918; 2 Taylor Evid. (6th ed.) 1035.

Evidence to show that the indorsement of the defendant in this case was made before the instrument was indorsed by the payee or delivered to take effect was admitted without objection; but it is not necessary to rest the decision upon that suggestion, as it is clear that the evidence would have been admissible, even if seasonable objection had been made to its competency: *Hopkins v. Leek*, 12 Wend. 105.

Like a deed, or other written contract, a promissory note takes effect from delivery; and, as the delivery is something that occurs subsequently to the execution of the instrument, it must necessarily be a question of fact when the delivery was made. Parol proof is, therefore, admissible to show when that took place, as it cannot appear in the terms of the note: 2 Taylor Evid. (6th ed.) 1001; *Hall v. Cazenove*, 4 East, 477; *Cooper v. Robinson*, 10 Mee. & W. 694.

Opposed to that suggestion is, that if a holder produces a note having a blank indorsement of one not the payee, the presumption is that it was made at the inception of the instrument: *Childs v. Wyman*, 44 Me. 433. Grant that, and still it is a mere presumption of fact, which may be rebutted and controlled by parol proof that it was not there when the note was delivered, or that it was made at a subsequent date: *Essex Company v. Edmunds*, 12 Gray, 273.

Third persons indorsing a negotiable promissory note before the payee, and before it is delivered to take effect, cannot be held as first indorsers, for the reason that they are not payees; and no party but the payee of the note can be the first indorser, and put the instrument in circulation as a commercial negotiable security. Such a third party may, if he chooses, take upon himself the limited obligation of a second indorser; but, if he desire to do so, he must employ proper terms to signify that intention,

the rule being that a blank indorsement supposes that there are no such terms employed, and that he is liable either as promisor or guarantor. Blank indorsements may be filled up to express the legal contract; and the true commercial rule is, that when the blank is filled, the instrument shall have the character of a written instrument, and not depend on parol proof to give it effect, nor be subject to be altered or contradicted by parol proof. Indorsements of the kind are, or may be, valid, as the law presumes that such an indorser intended to be liable in some form. It does not charge him as indorser unless the terms employed are proper to express such an intent; but if any one not the payee of a negotiable note, or, in the case of a note not negotiable, if any party writes his name on the back of a note, at or sufficiently near the time it is made, his signature binds him in the same way as if it was written on the face of the note, and below that of the maker; that is to say, he is held as a joint maker, or as a joint and several maker, according to the form of the note. Cases also arise where the signature of a third person is subsequent to the making and delivery of the note, and in that case, the third person, as to the payee, is not a maker, but a guarantor, and his promise is void if without consideration; but the consideration may be the original consideration if the note was received at his request and upon his promise to guarantee the same, or if the note was made at his request and for his benefit: 1 Parsons Contr. (6th ed.) 244.

Judge Story says that the interpretation ought to be just such as carries into effect the true intention of the parties, which may be made out by parol proof of the facts and circumstances which took place at the time of the transaction. If the party intended at the time to be bound only as guarantor of the maker, he shall not be an original promisor; and, if he intended to be liable only as a second indorser, he shall never be held to the payee as first indorser: Story, Pr., sec. 479.

Where the evidence on these points is doubtful, obscure, or totally wanting, courts of law adopt rules of interpretation as furnishing presumptions as to the actual intention of the parties. Difficulty in that regard can never arise where the indorsement is special, if it contains words proper to show that the party intended to be liable only as second indorser. Where the indorsement is in blank, if made before the payee, the liability must be either as an original promisor or guarantor; and parol proof is admissible to show whether the indorsement was made before the indorsement of the payee and before the instrument was delivered to take effect, or after the payee had become the holder of the same; and, if before, then the party so indorsing the note may be charged as an original promisor; but if after the payee became the holder, then such a party can only be held as guarantor, unless the terms of the indorsement show that he intended to be liable only as second indorser, in which event he is entitled to the privileges accorded to such an indorser by the commercial law.

Whether regarded as a second indorser or an original promisor, it is not necessary to allege or prove any other than the original consideration; but if it be attempted to charge the party as guarantor, a distinct consideration must appear: *Essex Company v. Edmunds*, 12 Gray, 272; *Brewster v. Silence*, 7 N. Y. 207.

JONES v. ROBERTS.

'6 CALL, 187.]

PARTY BOUND TO DO EQUITY.—It is a rule that he who seeks equity must do equity; and therefore, if a person having contracted for a lease upon certain stipulations, enters upon the land, and fails to perform the stipulations, he cannot compel a lease to be made to him, either by the original lessor or his assignee.

APPEAL from the high court of chancery. The case appears from the opinion.

Call and Hay, for the appellants.

Randolph, contra.

TUCKER, J. The case, as it may be collected from different parts of the record, appears to be as follows:

Robert Carter, of Nomony, being possessed of a large estate in Loudoun county, employed James Lane as his agent or steward, with authority to collect the rents, and contract for leases, etc. The leases appear to have been usually for three lives, with covenants on the part of the lessees for certain improvements, and a clause in restraint of alienation, without license from Carter.

February 25, 1767, William Musgrove took the lot in question for three lives, as appears by a memorandum in the handwriting of James Lane, of that date, signed by him. Musgrove dying in December, 1777, application was made by Nathaniel Smith, his administrator, for a lease pursuant to that memorandum. Robert Carter made the following indorsement on Lane's certificate: "No. 1, No. 4, J. Lane's certificate good."

By this indorsement, I conceive, was meant, that the lease promised to William Musgrove, to whom Carter appears to have thought that the right to the lease descended as heir to his father, for the lives of the said John Musgrove and Valender Musgrove, William, the third person whose name was to have been inserted in the lease being now dead. No lease, however, appears to have been made, nor any further application to Mr. Carter on the subject. In this state, matters remained until August 14, 1789, when upon a compromise of a suit brought by Charles Carter for the above estate, Robert Carter made him a deed for one moiety, including the lot in question. Smith, in behalf of William Musgrove's estate, appears to have paid the rents regularly to Robert Carter's agent, the last receipt bearing date in August, 1790

John Musgrove, having come of age, sold the lot in question to Roberts, the complainant in chancery, and executed a deed for it September 23, 1791; Smith, at the time of the sale, having given him all the information he possessed relative to the title.

August 11, 1791, Mr. Pendleton being about to levy an *elegit* on this estate, constituted Thomas Pollard his agent to negotiate the levying of the same, with full power and directions to receive the attornments of the tenants to him; and to receive and give acquittances for their rents, as they should, from time to time, become due, engaging to confirm whatever he should do in the premises. Two writs of *elegit* were executed in September, 1791; and in September, 1793, a third was executed, which included the lot in question, then occupied by the complainant Roberts. Pollard states, in his deposition, that he received the rents from the several tenants (making no exception) for the years 1791, 1792, 1793, 1794; and Mr. Pendleton, in his letter of February 6, 1794, requests him to continue receiving the rents, until a proposition made by Charles Carter, to him, to sell as much of the land as would pay off his debt should be completed.

December 18, 1794, Joseph Jones, the appellant, having notice of the service of the three *elegits*, purchased the whole estate of Charles Carter, subject to the same; and on the thirty-first of March, 1795, Mr. Jones, for the consideration of one thousand two hundred and forty pounds, obtained from Mr. Pendleton a release of his claim under the several writs of *elegit*.

It is expressly charged in the bill, and put in issue, that Mr. Jones, before his purchase, went over the lands, knew that the complainant was in possession of the lot; often conversed with him about the estate; knowing him to be a tenant thereon; had heard of the claims set up by the tenants; and he is expressly interrogated what he knew, or what he had heard of the claim and possession of the complainant before his purchase from Charles Carter. To these charges and interrogatories, he pointedly answers: That he is a stranger to the transactions between Robert and Charles Carter, previous to his purchase; that he does not recollect that Charles Carter consulted with him, or made any other communication respecting his claim or title to the lands, than might have been made to any indifferent person; that with respect to what he had heard or been informed respecting the tenant's rights before he purchased, he always understood

from Charles Carter, that after he acquired a title to the land, he found some of the tenants had no leases, or other pretense to continue on the land, than that of promises as they said from Robert Carter, or his collectors; and wanting the land to cultivate himself, he had demanded possession, but they refused to yield it under pretext of such promises from Robert Carter, or his agents; and that he should have proceeded to eject them, but from a conviction that he should soon be compelled to part with the land. He also states, that after the purchase made by himself, he evicted the tenants, and requested information on what terms they held their tenements, when he discovered that the complainant had no lease for the lot in question, or at least produced none to him. That to ascertain the fact, he examined the records of Loudoun and Fairfax, and could find none. That finding several other tenements in the same situation, he informed those tenants, that unless they would give up their lots, or come upon terms with him for renting them, he would have ejectments served to obtain the possession, which the complainant refused to do, relying on his right to hold the land on a promise from Robert Carter, or some agent or collector of his. That he was unacquainted with the terms on which the tenants respectively held their tenements, until after he had purchased the land, and the above investigation took place. This answer is not contradicted or disproved in any part of the record, that I have discovered.

That John Musgrove, the son of William (or Smith, his administrator), had an equitable title to a lease from Robert Carter for the lives of himself and Valender Musgrove, is, I think, fully proved by the answer of Robert Carter, the deposition of Nathaniel Smith, and that of Benjamin Dawson; and that, until January, 1788, when John Musgrove came of age, no laches is imputable to him, for not taking some steps to procure a legal title to such a term. But, from that period, it is imputable to him; for, in agreements of this kind, both parties are agents. It was, therefore, equally incumbent upon John Musgrove to demand a lease, as upon Robert Carter to tender one. Eighteen months elapsed before Charles Carter became the purchaser; and, in all that time, nothing was done by Musgrove towards obtaining a lease. He does not even appear to have given Charles Carter notice of his claim; but, in September, 1791, three years and a-half after he came of age, and two years after Charles Carter had purchased the land, without any communication with, or license from him, he sells the lot to the com-

plainant, Roberts, puts him in possession, and makes him a deed; which is found among the exhibits, reciting the nature of Musgrove's claim, and must have given the complainant full notice, if notice had not also been proved by Nathaniel Smith, in his first deposition. Roberts then was a purchaser with full notice of the nature of Musgrove's title. Now, although Musgrove had an indubitable claim upon Robert Carter for a lease, when he came of age to demand it, it was a mere equitable title that he had to one; and that subject to all the covenants and conditions, which it was mutually understood between William Musgrove, the father, and Lane, the agent of Robert Carter, were usually inserted in the leases which he granted. Among them there was a covenant or condition against alienation without license, by which condition, William Musgrove, and after his death, John Musgrove, his son, were equally bound in equity, as Robert Carter was to grant the lease for the three lives. Roberts had, or must be presumed to have had, full notice of all this when he bought the lot, and took an assignment of John's right, John Musgrove then engages to give every assistance in his power to Roberts towards obtaining a lease. Why did not Roberts apply to Charles Carter for a lease, during the two years that intervened between his taking this assignment, and the levying the *elegit* upon the lands? And why did he not apply, or make known his claim, either to Charles Carter, or Mr. Pendleton, for eighteen months after; and before Mr. Jones had become a purchaser from Carter, and a little longer period before he purchased the right of the tenant by *elegit*? Lastly, why did he not show the deed of assignment from Musgrove to Mr. Jones, when requested to communicate his title; but, on the contrary, why did he studiously and mysteriously conceal it? Was it, that he might drive him to bring an ejectment; and when he had got a judgment against him for his land, conjure up this dormant equity, the evidence of which had slept for near twenty years, for the purpose of saddling him with the whole expense of a suit at law, and another in equity? This willful concealment on his part, in my opinion, ought not to operate to his advantage, and to the vexation, delay and injury of a person pursuing his legal rights, without knowledge of this dormant equity, and without the possibility of discovering it by his own researches and exertions. No fraud, collusion, neglect, or other fault whatsoever, is imputable to Mr. Jones, in the whole transaction, yet (if I understand the course in the court of chancery, although not so ex-

pressed, or even noticed in the decree) may be condemned to pay the costs of both suits. The rule *caveat emptor* applies to legal, not to latent, and much less to willfully concealed equitable rights: 1 Wash. 217, 838, 839. Had the complainant made known the nature of his claim to the defendant, when he desired it, and proposed to come upon terms, all the trouble, expense and delay, which have ensued from his refusal, would probably have been avoided. By defending his title at law, instead of acceding to so reasonable a proposal, or at once bringing his bill for a lease, I conceive he is not entitled at this day to the aid of a court of equity, his own conduct throughout being a direct violation of its rules.

But this is not the only ground upon which I think Roberts not entitled to the aid of a court of equity. Being the purchaser of an equitable title only, with full, or at least strong, presumptive notice, that the tenant was restrained from alienation without license, no equivocal act of a fair purchaser, for a valuable consideration, of the fee-simple estate, not having notice of the nature of his title, ought to have any effect upon his case, unless it shall appear to the satisfaction of the court that such act could not have been done *diverso intuitu*, from that which is contended for. The acceptance of rent from the alienee or assignee of a tenant, who is restrained from alienation without license, is one of those equivocal acts which may, or may not, amount to a recognition of his title, and a waiver of the forfeiture, according to the circumstances. Roberts purchased at the very time that Mr. Pendleton sued out his first and second writs of *elegit*; and, although neither of these writs was levid upon the lots in question, it nowhere appears that he ever paid any rent to Charles Carter, nor indeed to Mr. Pendleton. All the receipts taken up to the twenty-first of February, 1795, which was after Jones's purchase from Charles Carter, being in the name of Nathaniel Smith, who, as administrator of William Musgrove, had paid them for the space of nearly one and twenty years before; the first receipt to him bearing date March 13, 1774. The acceptance of rent by Mr. Jones himself (is stated in the bill, and, therefore, need not be proved on his part) was on a condition that it should not affect his title: Cowp. 245. The presumption that the rent was accepted from Roberts, with full notice of the nature of his title, is thus completely done away, and having gained a possession, contrary to the equitable condition annexed to Musgrove's title, of which he must be presumed to have had full notice, he is to be regarded

as a mere tenant at sufferance, or, at most, as a tenant at will. In neither of these characters could he have any pretensions to a lease from the appellant. But his possession has been relied on as sufficient notice to the purchaser that he must take the land with peril in equity of every right which the holder can assert against the seller. To this, it is enough to answer that every person who occupies the land of another, as a tenant, is, in law, a tenant, at will, unless he can show a lease whereby his term is rendered certain. I have already shown that the purchaser made every inquiry and scrutiny which a knowledge of that possession would have led to. And to me it appears that Roberts's equity, be it what it might, would have been, and was, destroyed by his subsequent conduct to the appellant, for the reasons already mentioned.

A further reason why Roberts appears to me not to be entitled to the aid of a court of equity, arises from this circumstance: If he was entitled to a lease at all, it was such a one as the chancellor has directed to be made, with covenants as in Roberts's lease to Henry Taylor. I have before said, that John Musgrove, and, I will now add, all who claim under him, were in equity equally bound by the terms and covenants which were to have been contained in the lease as they would have been at law, if the lease had been executed by both parties and recorded. Among the covenants contained in Taylor's lease, one was, that the lessee should, within three years from the date of the lease, build thereon a good dwelling-house, of certain dimensions; another house of certain dimensions, as good as common tobacco-houses, and plant fifty apple-trees, and fifty peach-trees; inclose the same with a lawful fence, and at all times during the term, well and sufficiently maintain and keep, all and singular, the messuages, buildings, fences, etc., in good and sufficient repair. Another covenant is, that the tenant should not, without license in writing, work more than four laboring hands, nor commit or suffer any waste; nor sell or dispose of the premises without license, or suffer any wood or timber thereon to be disposed of otherwise than for the buildings, fences and necessary use of the plantation; and finally, that, in lieu of a breach or failure of any part of the above covenants, the lessor, his heirs and assigns, might re-enter, and hold the land, as if that deed had never been made.

Equity, considering that as done which ought to have been done, will refer the commencement of the lease to the time

when Robert Carter made the promise to Smith to grant a lease to John Musgrove for the two remaining lives. Although it should be contended that the infancy of John Musgrove should protect him from forfeiture on account of the non-performance of the covenants upon his part, yet his infancy expired, as I have noticed before, in January, 1788. From that period his infancy could be no protection. Roberts purchased in September, 1791, three years and a half after John Musgrove came of age, six months after the time when the improvements ought to have been made, supposing John Musgrove's lease to have been dated the day he came of age. Two years and a half more elapsed before Jones's purchase from Charles Carter and from Mr. Pendleton, was finally completed. In his answer, by way of defensive allegation, and as a reason why he should not be compelled to make a lease according to the prayer of the bill, he states, "that there are no improvements on the lot in dispute, such as required by the leases, and the land very much cleared and abused." The fact, thus put in issue, goes to the full denial of the plaintiff's equity. The depositions of John Taylor, Nathaniel Smith, Thomas Pollard and Daniel Ficklin, establish the fact, beyond the possibility of a doubt, there being no conflicting testimony with respect to it. It is a principle in equity, that he who demands the execution of an agreement, ought to show that there has been no default in him, in performing all that was to be done on his part. For, if either he will not, or, through his negligence, cannot perform the whole on his side, he has no title in equity, to the performance of the other party, since such performance could not be mutual. Nor will equity decree a specific performance in his favor, especially if circumstances are altered: 1 Fonbl. 391, 392. To say nothing of the non-performance of the covenants respecting buildings, orchards, and keeping the premises in repair, what compensation can Roberts now make for the waste and destruction which it is there proved that he has committed? Will equity decree in favor of a party who comes into its courts with such unclean hands? Will it declare that the appellant was not equally entitled to the benefit of the covenants intended to have been comprised in the lease, as the appellee? And if so, will it relieve the appellee against a judgment obtained at law, which, for aught that appears to the contrary, the appellant might have been entitled to, although Robert Carter, Charles Carter, or Edmund Pendleton, had sealed the lease which the court

of chancery has directed the appellant to execute? I think not; and for all these reasons, I am for reversing the decree, and dissolving the injunction.

ROANE, J., and FLEMING, J., concurred.

Decree reversed, and the bill dismissed with costs.

AUSTIN v. WINSTON.

[1 HENNING & MUNFORD, 33.]

LIMITATION OF RULE, POTIOR EST CONditio DEFENDENTIS.—Where a creditor had availed himself of his power over the debtor, and by misrepresentation, induced him to unite in a fraudulent conveyance to him of certain property, it was held that a court of equity ought to take cognizance of the situation of the debtor, as not being so culpable as the creditor, and apportion the relief granted to the degree of criminality in both parties.

BILL in equity. The principal point considered by the court in this case, was as to the applicability of the maxim, *in pari delicto, potior est conditio defendentis*. The facts of the case are fully stated in the opinions.

Randolph, for the appellant.

Warden, Duval and Wickham, for the respondents.

TUCKER, J. This case, as stated in the bill, and as it appears from the evidence, appears to be, in substance, this: William Winston being bound to Chapman Austin in a twelve months' replevy bond for one hundred and ninety-eight pounds, six shillings, of which about thirty-eight pounds had been discharged, when the bond became due was applied to by Austin for the balance; but not being able to pay it, asked for some further indulgence, as he proposed selling some lands for the purpose of discharging all his debts; or, if he could not sell his lands, he would sell a part of his negroes, and discharge his debt to Austin. Austin observed, that if he sold his lands for cash, they would not sell for near their value; therefore, he had better sell his negroes at once; for, if he did not sell them, they would be sold very shortly to discharge the debts of his brother, Geddis Winston, whose security he was, as high sheriff, and in other instances; and that he also knew his brother had sold and made over all his property to his children, and was worth nothing; and that it was his advice to keep his land, as it was not liable for debt, and sell a part of his negroes to discharge his

just debts, and make the rest over to his children, as his brother had done; and finally proposed that his negroes should be sold under an execution for his debt, in lots, so that they might sell for little or nothing, and get some person to buy them in for him; and that he, if Winston thought proper, would become the purchaser, and would make the negroes over to his children, as soon as Winston should pay him his debt, with interest. To this overture Winston lent a willing ear, and assented to it. It was then agreed that Winston and his family should not let it be known that Austin was to purchase in the negroes for him; but to tell every person that should make inquiry, that his negroes would certainly be sold; that Winston, on the day of sale, should proclaim to the people that the sale was a fair one, and after the sale was over, he must apply to Austin to lend him the negroes to finish his crop, to keep the people at large from thinking he bought in the negroes for him. To all which Winston agreed, and directed his wife (the plaintiff in the suit below) and his son Edward, from whose deposition this statement is made, not to tell any person of their plan; which, as far as it depended on Winston, was carried into execution at the sale, with the most scrupulous exactness; with this additional circumstance, that both he and Geddis Winston, on the same day, as it would seem, that this plan was adopted, wrote to the clerk of the court to issue the execution upon Austin's judgment, which had now become final. This execution, it must be remembered, was irrepleviabie, being upon a judgment on a replevin bond. The several depositions of Starke, the sheriff, Obadiah Faucett, Samuel Cross and Richard Littlepage, are in direct confirmation of Edward Winston's, and prove unequivocally that Winston most heartily co-operated with Austin in the proposed plan.

The sum and substance of this plan, or agreement, was to defraud the commonwealth, and all the other creditors of Winston, except Austin, under the pretext that the sale was a *bona fide* sale, made by a public officer acting under the authority of the law, to satisfy a debt *bona fide* due from Winston to Austin. Seventeen negroes were thus sold in lots, to satisfy a debt manifestly short of two hundred pounds, upon the face of the execution, and actually reduced at the time to about one hundred and sixty pounds only. The sale amounted to two hundred and seven pounds, fifteen shillings, and was publicly made September 20, 1789; and by an account stated between the parties, it appears that three of the negroes were actually sold and

conveyed back to Winston by Austin, for the same price he gave; and that the rest remained for a time in Winston's possession, under a pretense of hiring them till Christmas, to finish his crop. But before that period Winston died, and Austin having got the negroes, or some of them, into his possession, and sold a part of them, this bill was brought by the executors of Winston to redeem them, and to have those which are more than sufficient to pay the debt and interest returned, with an account of their profits, or their values, if the slaves themselves cannot be had. The chancellor decreed accordingly; and a balance of one thousand one hundred and nine pounds, five shillings and eight pence being found against Austin's estate by the commissioner's report, that report was confirmed. The bill, as to the purchasers of the slaves from Austin, was dismissed.

I deem it unnecessary, at present, to enter any further into the particulars of this case, as my opinion will be founded upon this statement. If, however, that opinion should be overruled, it may be necessary to say something further.

I have said that the sum and substance of the agreement between the parties was to defraud Winston's creditors of their just debts. Austin, it is true, proposed the fraud; but Winston, without whose concurrence Austin's fraud could never have taken effect, and whose creditors (and not Austin's) were to be defrauded by the contrivance, lent a willing ear and a ready co-operation to it. He, therefore, in point of moral guilt, was most culpable; for there was a moral obligation on him to pay his just debts; there was no such moral obligation upon Austin to pay, though the obligation not to defraud was equally strong upon him as upon Winston. Austin, meantime, appears to have been a *bona fide* creditor of Winston's. From the moment that his judgment was consummate, he had a legal lien on his lands also. The defendant could not replevy the slaves; they were after the execution issued in the custody of the law, and must have been sold, even for a tenth part of their value. Austin had a legal right to bid for the slaves, and the moment they were struck out to him, the title was absolutely in him, as against Winston, both at law and equity; and even against Winston's creditors, to the full amount of his own debt. The case is stronger in Austin's favor, upon these grounds than any private conveyance from Winston could have made it; for what is done under the direction and authority of the law is more obligatory than any act of a party alone.

Now, an absolute deed between the parties, made with intent to defraud the creditors of the grantor, would be binding between the parties themselves, though merely void as to creditors, by our statute of frauds and perjuries: L. V. edit. 1794, c. 10, or Rev. Code, vol. 1, c. 10, p. 15. Consequently, this sale, made under the authority of the law, to satisfy a just debt, is equally binding between the parties, whatever may be the effect of the collusive agreement between them as to creditors.

It is a maxim at law that where the parties are equally culpable or criminal, the defendant must prevail; and in equity, that he that hath done iniquity shall not have equity; that is, he shall not have the aid of the court when he is plaintiff; which brings both maxims to the same point. And the maxim of the civil law, as cited, 1 Fonb. 233: *Pacta quæ contra leges et constitutiones, vel contra bonos mores sunt, nullam vim habere indubitati juris est*: Dig., L. 2, T. 8, l. 6. The cases both at law and equity, in support of this rule, are numerous, and are referred to: Francis's Max. 2; 1 Fonb. 138, 223-230. The case of *Small v. Brackley*, 2 Vern. 602, which was a bill brought by a bankrupt to be relieved against a bond given to a particular creditor, who refused to sign and accept a composition for her debt, to be paid as other creditors, unless the plaintiff would pay her one hundred pounds down, and three shillings in the pound over and above the composition, was finally dismissed by the Lord Chancellor, though a decree was given in his favor at the rolls. *Parsons v. Thompson*, 1 H. Bl. 322, and *Garfoth v. Hearon*, Id. 327, are both decisions upon the same principle, viz: that any agreement which is contrary to the true policy of law, shall not have the aid of a court to enforce it at law. The case of Sir Arthur Ingram, cited Co. Litt. 234 a, seems to have furnished the rule in the latter; and it is there said, H. Bl. 331, that courts of equity, in setting aside securities supposed to be valid at law, have gone by the same rule, as in the case of *Juxon v. Morris*, those cited from Lord Nottingham's notes, and said to be misreported, 2 Ch. Cases, 42; and in *Law v. Law*, 3 P. Wms. 392. *Cockshott v. Bennett*, 2 T. R. 763, was a decision at law, founded on the principle of law against the creditors of the party making the promissory note upon which the suit was brought: *Vide Jackson v. Duchaire*, 3 T. R. 551, and *Jackson v. Lomas*, 4 T. R. 166. The case of *Trueman v. Fenton*, Cowp. 544, may be thought an authority against the course of these decisions. In that case a bankrupt, after a commission of bankruptcy sued out, in consideration of a debt due before

the bankruptcy, gave a note to his creditor for a part of his debt; and the court held, the creditor was entitled to recover; for the creditor did not prove his debt under the commission, but gave up two notes not yet due to the bankrupt, and took a note from the bankrupt, payable at a future day, for about half the sum. Here was no fraud upon the creditors, for this creditor never did, nor, after accepting the security in lieu of the two notes delivered up to be canceled, ever could prove a debt against the bankrupt before his bankruptcy. The case of *Walker v. Perkins*, 3 Burr. 1568; 1 W. Bl. 517, S. C., was upon a bond in consideration of the parties having agreed to live together. And Mr. Blackstone, then at the bar, argued for the plaintiff, that the setting aside such bonds was as much an encouragement to seduction in one sex as establishing them would be in the other; and the same argument may be applied to the case before us. The court, in the case I have cited, decided, however, in favor of the defendant; and my impressions concur with that decision; which corresponds with Lord Hardwicke's, in *Robinson v. Gee*, 1 Ves. 254; *Priest v. Parrot*, 2 Ves. 160; and in a much harder case, 3 P. Wms. 339, *Lady Cox's case*. Cases to the same effect may be multiplied much further; on the other hand, I am well aware that others may be produced where the doctrine contended for by Mr. Blackstone, in the case of *Walker v. Perkins*, above mentioned, has prevailed; but I incline to the contrary opinion, as thinking that all contracts founded on motives or considerations against the policy of the common law, or against the provisions of a statute, or against the policy of justice, or the rules and claims of decency, or the dictates of morality, are void both in law and equity, and ought not to have the aid of a court to carry them into effect. A combination between a debtor and a particular creditor, to defeat all the other creditors of the debtor of their executions against his estate, is one of great moral turpitude, more especially on the part of the debtor, although the project may have been proposed on the part of the creditor. For the debtor is bound to do an act towards his creditors; that is, to pay them their just debts, and this, *in foro conscientiae*, he is bound to do punctually, and without delay. There is no such obligation on the part of any other than the debtor; a contrivance to defraud on the part of the debtor acquires, as I conceive, an additional degree of moral turpitude, from this previous obligation to pay, superadding to the neglect of a moral duty, the commission of a moral injury. But, without pretending to balance the guilt

of the parties against each other, both appear to me so culpable that, had Austin been the plaintiff, and Winston the defendant, I should have held him as little entitled to the aid of a court as I now think Winston.

But it may be said that Austin's situation, as a creditor with an execution in his pocket, gave him a control over Winston, which might have its influence; the law admits no such excuse for injuries to a third person. Had Austin proposed an usurious contract, the argument would have applied; because a party assenting to an usurious contract merely to gain further indulgence, is supposed to injure nobody but himself. But one assenting to a proposal to rob another, either on the highway, or by any collusive agreement with the party proposing, has, I apprehend, no such excuse in his favor, either at law or in equity. Besides, there is no evidence of threats or importunity.

But, to give a color to the case, the bill suggests that Winston's creditors will be injured unless relief is given. But Winston's creditors are not parties to the bill. If they had been, I should have thought them entitled to relief. And, if this bill be dismissed, I should hold them still entitled to it.

For these reasons, I am of opinion that the chancellor ought to have dismissed the bill. But, as the court is probably divided upon this point, I shall proceed to consider what relief the chancellor ought to have given (since, by a division of the court upon this point, the decree, so far as giving some relief, must be affirmed); and even admitting Winston entitled to relief, the measure of it in the decree far exceeds any estimate in my mind.

Austin, by his execution, had a legal lien on all Winston's negroes. If less than all would not sell for enough to pay it off, all must have been sold, without reserve. If a part only would have been sufficient, it was Winston's fault, no less than Austin's, that more than would have been sufficient were exposed to sale; and *volenti non fit injuria*. The most that Winston can claim, I apprehend, is the excess of the value of the slaves, as they might have sold if the sale had been perfectly fair, above the sum due upon Austin's execution. Having assisted in preventing the slaves from selling for their full value, or rather, being, as far as I can discover, the sole agent who prevented others from bidding, he ought, so far, to take the consequences of his own folly or depravity. Subsequent purchasers from Austin, who was notoriously the highest bidder at a public sale, and confessedly, on the part of Winston, a fair

purchaser, ought not to be affected by any secret agreement between them; even if that agreement had not been fraudulent, as it undoubtedly was, in its foundation. The executors of Winston are no more entitled to favor than the executors of Austin; perhaps less, as one of Winston's executors appears to have been present at the original agreement between Austin and Winston; but I lay no stress upon this, at present.

I am, therefore, of opinion, that the utmost that the complainant is entitled to, is the difference of the value of the slaves, which actually came to the hands of Austin, and were afterwards sold by him to the other defendants, or were retained by him, as the slaves would have sold at public auction on the day of the sale, for cash, and the prices for which those slaves sold, after deducting therefrom the full amount of Austin's just debt, with legal interest on the balance, if any, until paid; that the value of the slaves as they would then have sold, upon those terms, be ascertained by a jury, and that the depositions taken in this cause, so far as the same relate to the value of slaves at that time, may be given in evidence by either party, in case of the death or absence of the witnesses by whom those depositions were made, but no farther; and that an account of the amount of Austin's debt on the day of sale be taken, and the balance adjusted upon those principles; and that so much of the decree as dismisses the bill as to the other defendants, except Austin's administratrix, be affirmed.

ROANE, J. This is a bill brought by the appellees, executors of William Winston, deceased, against the appellant, administratrix of Chapman Austin, deceased, praying execution of an agreement, whereby it is alleged, that Austin bound himself to Winston, to permit him to redeem certain slaves of his, sold under an execution of Austin's, and purchased by him. The ground taken by appellant in his statement is not that Winston is barred from making the demand by reason of the turpitude of his conduct, but that Austin made no such agreement, and committed no fraud against Winston, but acquired a *bona fide* title thereto, under the sheriff's sale. It is clear from a full consideration of the testimony, that such an agreement on the part of Austin is proved, and that he delivered possession of the negroes, after the sale to Winston, but afterwards repossessed himself thereof, by various pretenses, and by force and violence. It is also clear that, if, in this transaction, Winston was guilty of no fraud to Austin or others, or (in case he did commit a fraud), if that fraud was neutralized and palliated by

the hardship or peculiarity of his situation, there is then nothing to impede the specific execution of the agreement. It is alleged, but not shown, that there were creditors of Winston who may be affected by the transaction in question; but this cause is now to be decided between the parties to that transaction only, and nothing now done can bar the rights of the creditors, if any, to overhaul it hereafter, if they think proper to do so. In order to shorten this discussion, I will readily admit that the conduct of both the parties to the transaction tended to set up a fraud against other creditors, if there were any; and the real question is, whether a proper apology for such fraud exists on the part of Winston, arising from the circumstances in which he then stood.

A great mass of testimony exists in the cause, all of which I have duly considered, but none of which I shall particularly repeat, as I am governed very much in this case by general principles; but the case, as it respects the question before us, is briefly this: That Winston, indebted to Austin on a replevy bond for ———, had no other thought or intention but that of selling his land and paying the debt; that Austin applied to him for payment; first advised him to sell his negroes, rather than his land, alarmed him with the danger of being reduced to beggary by his own and Geddis Winston's debts, and putting on the guise of a friend, proposed to him the plan which is detailed in the testimony; and that Winston, confiding in him, dreading the impending danger, and seeing no other means of relief than this, even against Austin's own execution, readily clutched the proposal, acted his part in the furtherance of it, and his negroes were sacrificed at the sale, unless Austin be now held to his agreement.

The great principles on which this question is now to be decided, are common to those cases in which oppression and imposition are expressly guarded against by statute, in aid of the general principles of law and equity (such as the case of usury and the like), and such cases wherein no statutory provision has been made. The selection of a description of cases, which are of crying enormity, and demand the powerful interposition of the legislature to aid the general principles of law, does not abandon other cases standing on the same ground, but which, perhaps, do not require any statutory aid. The selection of usury, for example, does not surrender that protection which the law has ever afforded to debtors, against the influence and power of their creditors, to young heirs against those who seek

to devour them, to wards against their guardians, and to various other descriptions of persons standing on a similar ground, and whose imbecility in such a contest has always received the protection of courts of justice: See 3 Bac. Abr. Gwil. Edit. tit. Fraud, 298–306. All these cases proceed on this ground, that, for a contract to be binding, the parties must be free, and that no man can be considered as *particeps criminis* in a transaction, unless he entered into it freely: 1 Fonb. 218, 1st ed.; and it is a general principle, that the doctrine in favor of young heirs is extended to all persons, the pressure of whose wants may be considered as obstructing the exercise of their judgment: 1 Fonb. 124, 1st ed.; see also 1 Fonb. 229; 2 Fonb. 6, Phil. ed. Gentlemen may be as loud as they please in denouncing fraud, but there can be no fraud which merits the utter reprobation of a court of equity, unless (if it be not supererogation to say so) it be entered into freely, and *mala fide*. The general doctrines to be found on this subject in Fonblanque and other books, in which relief is reprobated by a court of equity, are confined to cases in which a voluntary fraud has been perpetrated, and in which no apology is to be found in the oppression and distress of the party's circumstances. Even in that event, relief is only granted to the distressed party; the volunteer in the fraud is forever bound thereby. I say the general doctrines to be found on this subject; but there are special cases, which merit a more particular examination. Many of the cases upon this subject relate to frauds on marriage agreements, which have nothing to do with this question; not only because they are frauds on marriage treaties, which have produced an indissoluble union of parties, and therefore must forever bind, or the wife and family be irreparably injured; but are also voluntary frauds committed under no pressure. These agreements in fraud of marriage, we are told (*North v. Ansell*, 2 P. Wms. 619), must bind, on the ground that you cannot put the wife in *statu quo*, or unmarry the parties; and marriage is so much favored in equity, that we are told (*Roberts and wife v. Roberts*, 3 P. Wms. 66) that it is a case, and perhaps the only case in equity, in which a *particeps criminis* is permitted to avoid his own acts; so highly favored is the consideration of marriage.

Most of the other cases put by the judge who preceded me (if not all of them), are susceptible of answers which do not impugn the great principle I contend for. In the case of *Small v. Brackley*, 2 Vern. 602, decided in 1706 (and I beg that

the answer I offer to it may be extended to other cases of a similar nature), it was decided that the plaintiff (who had committed a great fraud against the defendant in the first instance, and then became bankrupt, after which he paid one hundred pounds and gave a bond for seventy-five pounds to his injured creditor to enter into a composition with his other creditors for his relief), should not be relieved as to the said money and bond, although it was in fraud of the other creditors. The chancellor, in giving his decree, laid stress upon his original fraud and breach of trust; but at this day, the grounds of that decision would certainly be exploded (I mean independently of the original breach of trust); at that time, the case of *Tbmkins v. Bernet*, 1 Salk. 82, was held to be law, on the ground of *volenti non fit injuria*, and money paid on an usurious contract could not have been recovered back in an action for money had and received; but at this day, the case of *Tbmkins v. Bernet* is utterly exploded: See 2 Fonb. 6, note; also 1 Fonb. 245, note. The payer of the money is not held to be a *particeps criminis*, on account of the duress of his situation, and the contract as to him is cleansed of its impurity. A case on this subject, to be in point, should show that relief cannot be obtained in equity, since a recovery has been legalized in courts of law; but, in truth, the principle of that decision has been since overruled in the cases of *Bosanquet v. Dashwood*, Cas. Temp. Talbot, or Forrester, 38, and others, holding that money paid by coercion may be recovered back in equity, as well as at law; and that equity will even go beyond the law in affording relief in such cases: 1 Fonb. 218, Dub. ed.

The doctrine I subscribe to, therefore, is this, that in cases of equal frauds committed against third persons (I mean where the parties thereto are equally guilty), although such frauds operate no injury to the rights of such third persons, and create no rights in favor of the parties thereto, yet in that case possession stands for the right; and that one volunteer in such fraud may, as against his equally guilty companion, retain any advantage he has gained. He may not only, as against him, retain money thus iniquitously acquired, but retain, in absolute right, property which would otherwise be liable to redemption; but in both cases, right is out of the question, and if the turpitude of his adversary is annihilated or done away, his possession or his advantage cannot avail him. He does not stand on any merit of his own, but merely on the ground of the incompetency of his adversary to be received or countenanced in a court

of justice, to set up a scandalous pretension, in which he is equally *particeps criminis* with himself; but whensoever the criminality of his adversary is held not to exist, and the transaction, as to him, ceases to be scandalous, equity does not refuse to hearken to his pretensions.

In the cases I shall presently put, as arising under the statute of usury, the statute of bankruptcy in England, and even the common law case of money paid by a debtor to his creditor beyond the principal and interest, in all which cases money paid under duress, and in fraud of other creditors, was recovered back in an action for money had and received, that recovery was only sustained on the ground that, in fact, no fraud was meditated by the persons paying the money, or rather that the fraud was purged, and the conduct of the parties purified by reason of the duress of their situation. On no other ground than this could that action have been sustained; an action which only lies where the plaintiff *ex æquo et bono* (which implies innocence of fraud) ought to recover, and which has been aptly compared, as to this point, to a bill in equity. If, in the actual case before us, the appellee had, in addition, paid to the appellant a sum of money, as a consideration for his accomplishing the transaction in question, would it not be an enormity that while the advantage gained by the appellant, by the possession of the money, should not avail him against the effect of an action for money had and received, and the appellee was acquitted, by reason of his situation, of all fraud in relation to the transaction, without which the action at law could not be sustained, the adverse party, for whom no such apology exists, should, in another forum, expressly instituted to relieve against frauds, execute agreements, retain the advantage he has gained, discharged of its condition, and pocket the fruits of his iniquity?

But it is said, or may be said, that this creditor was not a perfect Shylock to his debtor; that the fatal scales were not yet uncased, nor the hapless victim yet pinioned for the operation. If it were necessary (but it is not), I might be almost justified in taking the affirmative of this picture in relation to the creditor; and the creditor himself has almost admitted the affirmative also, in relation to the debtor. Deplorable, indeed, was his case depicted to be by the appellant; and it is a good general rule that, between the parties, things shall be taken to be as they are represented to be. But all this has nothing to do with the question. I go upon general principles; but at the same time do not admit that the facts of the case before us weaken

the force of those principles in relation to it. It is not necessary, and has never been so decided, that the oppressed man, or the debtor, must be driven to the wall, and have no other possible refuge but in the proposal suggested to him by his creditor or other person standing in a relation to him which implies an undue influence. In all the cases of relief against usurers, offenders against the bankrupt laws, guardians getting advantage of their wards, counsel of their clients, jailers of their debtors, moneyed men and usurers entrapping young heirs, etc., as well as in the case of debtors, the law goes upon general principles, and takes it for granted that persons in those situations are peculiarly liable to imposition. It enters into no minute examination of the artifices of those entrapping on the one hand, nor, on the other hand, whether the person entrapped might not have subsisted yet a little longer without submitting to the meditated imposition. It goes on the ground of *mala fides* on the one hand, and the necessity of preventing imposition on the other. It goes upon the general ground of preventing iniquity and extortion.

I will not deny but that courts of equity might, in flagrant cases, go into such an inquiry; but the proofs in the case before us do not make it necessary to depart from the general principle in this instance. The black series of rigor, injustice, fraud, violence and oppression, of which this record clearly convicts the intestate of the appellant, on the one hand, shows whether he was not a creditor to be dreaded; and on the other hand, the dismay naturally resulting from executions on replevy bonds, in those days, when property is proved to have been sacrificed at sheriff's sale (to say nothing of Austin's own strong and interested portrait on this subject), enables us to judge whether Winston, assailed, too, by the cries and tears of his family, had not just cause of alarm and apprehension. Make the worst of this case, as it respects Winston, it clearly appears that he was not only seduced by Austin from his honest intention of selling his land and paying his debt, but that his purpose was not so much to defraud his creditors as to escape from the execution of Austin, and shelter himself and family from destruction.

But it is said by the judge who preceded me, that Winston was probably indebted; that his conduct was a great violation of morality in respect to his creditors, and that in point of morality he was most culpable. That Winston violated the principles of morality is already implied by the admission that

he had committed a fraud; but that fraud is palliated and excused by reason of the imbecility of his situation. But how does the case stand in relation to Austin? Who shall not be permitted, in a transaction of this kind, to hold up his face, either in a court of law or equity, unless his competitor be *pari delicto* with himself? To say the least, he hatched and brought to maturity a free and voluntary fraud to the injury of Winston's creditors; to say the truth, he capped the climax of his iniquity by committing a double fraud towards his companion. So little regardful was he of the rules of morality, that he has not even observed a maxim sacred among thieves and felons, to be just and honest towards one another. It is with great reluctance that I make these strong observations; but the truth of the case, and the ground I have taken on this occasion, demand it from me. It is necessary, in deciding whether the culpability of the parties is equal, to take a view of the conduct and situation of them both.

I will now avail myself of the mention of some common law decisions on this subject, in which the ground I have taken is, even in the law courts, solemnly and ably supported. Some of these cases arise from the violation of statutes made in aid of the general principles protecting persons from oppression, but one of them at least (and many others might be found), stands merely upon the common law principle. There is so great an analogy between this whole catalogue of cases, whether considered as in equity, at common law, or under the statutes, that I can make no discrimination between them. Great principles are not to be shaken by particular modifications and provisions, especially in a court of equity. I will premise that some of the old cases, and especially the leading cases of *Tomkins v. Bernet*, are strongly and justly exploded in the cases I shall now mention. That leading case, as I have already said, denied the recovery of money paid to an usurer, beyond legal interest, in an action for money had and received. It was so decided, too, on the maxim (now strongly exploded, as applicable to that and similar cases), *volenti non fit injuria*. The modern and exploding decisions will now run through, and affect all cases in which the party paying the money is not free. The old cases (now exploded) produced, as I humbly conceive, the decision of *Small v. Brackley*, already noticed, and other cases of a similar nature; and when, in addition to this, it is recollected that courts of equity have concurrent jurisdiction with courts of law in decreeing a recovery of money under like circumstances, what pre-

vents equity, which delights in decreeing contracts to be performed in specie, from doing so in a case like the present? But I must return to my subject.

In the cases now to be noticed, it is on all hands admitted as a general, perhaps as a universal proposition, that in *pari delicto potior est conditio defendentis*; but in the application of this rule some important distinctions have been solemnly and ably settled. It is said in them that the prohibitions enacted by positive law, in respect of contracts, are of two kinds: 1. To prevent weak or necessitous men from being overreached, defrauded or oppressed; and, 2. Those prohibitions which are founded on reasons of policy and public expedience: *Clarke v. Shee*, Cowp. 200; *Browning v. Morris*, Id. 702; *Smith v. Bromley*, Doug. 670.

Under the first class of cases it is held, as has been already said, that money paid under an usurious contract, beyond legal interest, may be recovered back in an action for money had and received; and that money paid by a bankrupt, or even a friend of the bankrupt, in England, for his consent to sign a certificate (which is made illegal there by a particular statute), may also be recovered back in a like action. The principle on which these decisions proceed, is that there is not in those cases *par delictum*; for that the oppression and distress in which one of the parties stands, places him within the power of the other, and mitigates the culpability of his conduct. Those statutes are professedly made to prevent oppression; and the act of a party arising only from his oppressed situation, and the severity of those under whose power he is placed, shall not bind him, and defeat the very end of the statute. It is not necessary for me to say anything respecting the other class of cases, as they are not analogous to the case before us, but merely that where a recovery is inhibited in them, there is nothing in the circumstances or situation of the plaintiff which exempts him from being considered as equally criminal with the defendant.

In the case now before us, there is no positive statute contravened, as has been often said, such as those alluded to in noticing the first class of cases before mentioned; but the principles on which such statutes have been made, have been violated in the case before us. A debtor, under a severe pressure of his circumstances, and under the influence and high-colored representations of his creditor, has consented to a proposal dictated to him by that creditor. Was the debtor free to refuse or accede to this proposition? He certainly was not.

But we need not rest this part of the case on general reasoning, and on the pointed analogy which exists between this case and those just noticed, arising under positive statutes; for in Bull. N. P. 132, it is held: "That if a person, under the influence of his creditor, pay more than legal interest, he may recover it back, for he is under a moral tie to return it." In that case (as in this), did not the debtor also commit a fraud upon his other creditors, if he had such, by paying to the particular creditor an illegal sum, which should have been reserved for his general creditors? In this case (as in that) is not Austin under a moral tie to comply with his agreement for redemption? An agreement, the violation of which will involve a double fraud, first upon Winston's creditors, and then upon Winston himself.

If, in the case just quoted from Buller, a recovery was had on general principles, our case is rendered much stronger by the consideration that Austin, having an execution against Winston on a replevy bond, strongly depicted to him the desperateness of his situation, and pointed out to him the plan he proposed, as the only means of saving his family from destruction. Was Winston, ignorant himself of the law, alarmed by the representations of Austin, and seeing, perhaps, no refuge from his then situation but in the adoption of Austin's proposals, free to refuse that proposal? Let the general principles which dictated the statutes before mentioned; let the feelings of all men placed in like circumstances; let that benignity of the law which compassionates the infirmities and the distresses of men, answer the question.

But wherefore shall a specific performance of Austin's agreement with Winston be not decreed? Does any one pretend to say that he (Austin) is entitled to any favor? And admit for a moment that Winston, on his own merit, is not entitled to a specific execution of the agreement; shall we not consider the case of his other creditors? In decreeing for him, are we not also decreeing for them? By decreeing the negroes to Winston, unshackled by any conveyance of them to his children (which was a part of the plan suggested by Austin), they are immediately liable to the executions of his other creditors; whereas, by deciding in favor of Austin, those creditors can never come at them, without a tedious suit in chancery against Austin, to annul the sale under which he acquired them. Whether, therefore, we consider the actual interests of Winston's creditors, or wish to avoid a circuitry of action and mul-

tiplication of suits, we ought to decree a performance of his contract against Austin, in the present case.

But it is said that he who comes here for relief must draw his justice from pure fountains. The same is said, and justly said, at law, in the action for money had and received: Bul. N. P. 132. But, in the law cases before put, the fountain from which the plaintiffs drew was held to be purified by the duress and peculiarity of their situation. Such, also, I apprehend, is the case before us. It is further said that specific agreements are in the discretion of the court, and will not be enforced but where all is just and fair. Agreed—but it would seem that supporting an action for money had and received, would give a good general rule on this subject, which action only lies where *ex æquo et bono* the plaintiff ought to recover.

Two circumstances were relied upon by the court of king's bench, in the case of *Smith v. Bromley*, which I will briefly remark upon, as strongly applying to the present case; and then dismiss this part of the subject. The first is, that the fraud there effectuated against the bankrupt laws, moved, as in this case, from the creditor to the party oppressed, or rather to his sister, who, from motives of affection, acted for her brother, and placed herself in his situation. The second circumstance is, that the action was sustained, in that instance, in order to discourage frauds of that nature; for a discouragement to take money, on illegal considerations, would clearly be operated by holding the takers liable to refund the money so illegally taken. So, in the present case, let us cut up by the roots and discourage enormities like the present, by making the chief actor in the fraud disgorge his iniquitous gains; let us not forget that men will generally act right when there is no temptation to the contrary. By dismissing the appellee's bill entirely, will you not ratify to Austin the entire fruits of his iniquity; and will not this effect be partially produced in so far as you stop short of an actual restitution in specie, or an actual restoration of the value of the property, with interest?

With respect to the particular decree in question, I see no reason to alter it or disturb it. If Winston is entitled to a specific execution of the agreement, he is entitled to the negroes themselves, where they have not *bona fide* lawfully passed to other persons, and to their profits. A trustee is liable for the just value of the thing converted, and the *cestui que trust* is not to be bound by any injurious sales made by him. The decision of this court in the case of *Reynolds v. Waller*, 1 Wash. 164, comes fully up to this point.

As to the general table, by which the profits were settled in the present case, it is not shown, if pretended, that it has wrought any injury. With respect to the vendees of the slaves, it is unnecessary to decide whether the court has power to affect their interests, or in other words, whether they may be considered as now before us; for, on the merits of the case, it is clearly shown that they purchased *bona fide*, without notice, and for a valuable consideration. Austin himself has taken this ground in his answer; and as he has done the same in relation to Campbell, it does not now lie in his mouth to object that Campbell is not made a party. He has taken the ground in his answer, that Campbell's right to the negroes can never be impeached by Winston, and ought now to submit to a decree predicated upon that admission. That admission is competent to bind Austin, and may be closed with by the other party, (as is done in the present case), but would not have prevented Winston from contesting the same, and going for the identical negroes, had he thought proper. Nothing is more common or right than to drop parties to a suit, when in the progress thereof it seems consented to on both sides, that such parties are unnecessary. The delays and difficulties incident to suits in equity are great enough already. In the case of *Paulet v. The Bishop of Lincoln*, 2 Atk. 300, it is held that a plaintiff may, at the hearing, waive the relief he prays against a particular person, and that then the objection that he is no party will have no weight. So in this case, the plaintiff, before the hearing, suffered the suit to abate as to Campbell, confiding in and closing with Austin's statement of the sale made to him, and waiving his claim to go for the identical negro against the representatives of Campbell.

I have thus endeavored to explain the grounds and reasons of my opinion. On the great question whether relief shall be granted, I am happy to find that the concurrence of one other judge on this point will secure some relief to the appellees. As to the measure of that relief, I regret that I cannot entirely accord in the project proposed for a decree, great as my respect is for the quarter from whence it came. I cannot readily see that any other decree than one for the identical negroes, or their just values, with interest and profits, will either accord with justice, with previous decisions by this court, *Waller v. Reynolds*, and others, or with the principle of preventing the appellant from enjoying the fruits of his iniquity. I cannot readily see, that when it is admitted that an action at law, or in

equity, would lie, for recovering back money paid for the furtherance or accomplishment of a contract like the present, thereby disaffirming the turpitude of the plaintiff, and admitting the iniquity of the transaction, as it relates to the defendant, the court will not go on, and, pursuing the same principles, disrobe the transaction (as between these parties), of its iniquity, by holding the defendant to the stipulated condition of redemption. I cannot well see that the appellee should be held, in the present case, to a valuation commensurate with the probable product of sheriff's sales in those days, when it is in proof that he had intended to sell his land rather than his negroes, before the intromission of the appellant with his plan of seduction, and might have done so, with perhaps less loss than would have arisen from a sheriff's sale of his negroes, as appears by the testimony. In event too, for everything depends upon the opinion of the jury, the appellant himself may be actually placed in a worse situation than if he were decreed to a specific performance.

Yet, after all, I am not so sanguine on this point as on the other. I am not prepared to say that the sustentation of an action for money had and received, affords a universal rule for decreeing a specific performance. I well know that the exercise of this power depends much upon circumstances, and the discretion of the court. In a case, therefore, depending upon a mass of facts and testimony, I will not obstinately contend against the opinions of the other judges, that an actual specific performance, and nothing else, ought to be decreed. I will, therefore, concur in the extent of the relief proposed (after having declared my sentiments on both points), and thus afford some, though, I think, an inadequate relief to the appellees. I will on these grounds, and on these only, assent to the decree which has been agreed upon in conference, as the result of mutual concession and compromise.

CARRINGTON, J., concurred with ROANE, J., as to Winston's executors being entitled to relief.

LYONS, J., said, at first he was inclined to hold to the rule *potior est conditio defendentis*; but he said the severity of the rule under all the circumstances being thought too great in this instance, he therefore concurred in a decree of compromise, which he was directed to report as follows:

The decree of the high court of chancery is reversed, and an issue is directed to be made up, and tried before the Richmond

district court, to ascertain what the slaves taken and sold by the sheriff of Hanover, to satisfy Austin's execution in the bill mentioned, except such of them as were returned to the complainants, or have otherwise come to their possession, would have sold for in ready money, on the day of the sale, if then fairly sold, without the interference or collusion of Austin and Winston, to a *bona fide* purchaser or purchasers; on the trial of which issue, all the depositions taken in this cause relative to the sale and prices of the said slaves, if the witnesses be dead or absent, shall be admitted to be read as evidence to the jury, together with any other legal evidence, by witnesses or otherwise, which either party may produce; and that Austin be charged with the prices of the slaves as found by the jury, and be credited for the amount of his debt, with interest at five per cent. to that day, and that the appellant, out of the goods, etc., to be administered, pay the balance or overplus of the sales to the appellees, with interest from the day of sale, and the costs in chancery.

The elaborate examination given to this case, and the able opinions of Tucker, J., and Roane, J., justify us in reporting this case, although the judges differed. The case is regarded as important as showing a modification or limitation of the doctrine *potior est conditio defendentis*. The Virginia courts, however, have reluctantly admitted its authority, it having been decided by a divided court. The latest reference is in *Harris v. Harris*, 23 Gratt. 737, decided in 1873, which is a very able and well-considered case. Christian, J., thus refers to the case: "These doctrines must now be considered as settled too firmly to be shaken. There is but a single case which can be said to be in opposition to the views herein expressed, and that when properly understood has no application to the case. This is the case of *Austin v. Winston*. In the first place, it may be said that this case has never been followed. It was a decision of two judges, and its authority has been seriously questioned. In *James v. Bird*, 8 Leigh, 510, already referred to, Judge Parker says: 'There is no case in equity where relief has been given to a fraudulent grantor of property, the conveyance being made to protect it against his creditors, except that of *Austin v. Winston*, decided by a divided court, and perhaps, under the circumstances, properly decided.' Mr. Conway Robinson, in his admirable work, in reference to the same case, says: 'Notwithstanding *Austin v. Winston*, the case of *Hawes v. Leader*, Cro. Jac. 270, was approved in *Stark v. Littlepage*, and such is the general course of decisions;' and in a note to the text he refers to *James v. Bird*, 8 Leigh, 512; *Terrell v. Imboden*, and *Owen v. Sharp*, in all of which, and especially the last, *Hawes v. Leader*, was approved as unquestioned law: 5 Rob. Pr. 543. But conceding that *Austin v. Winston*, is sound law, and its authority unquestioned, still the case before us cannot be brought within the principles of that case. The relief given in that case was founded upon the fact that the grantee, a creditor (the debtor being in distressed circumstances), had availed himself of his

power over him to induce the debtor to unite in the fraud; the creditor having proposed and urged the execution of the scheme which was adopted for that purpose."

In *Clay v. Williams*, 2 Munf. 121, the court merely distinguished the case there as different from the principal case. In *Starke v. Littlepage*, 4 Rand. 371, the case was distinguished as peculiar for the reason as stated by Christian, J., *supra*. In *Jones v. Comer*, 5 Leigh. 357, its authority is recognized as in *Griffin v. Macauley*, 7 Gratt. 564. The best principle on which the case may be established is stated in *Irons v. Reyburn*, 11 Ark. 382, the court saying: "There are many anomalous cases, not impugning the general principle, but supposed to be placed beyond its influence by the particular circumstances of the case, as where the party has been seduced from the path of rectitude by the allurements of strong circumstances, and by these means been made in some sense the slave of another's will; the law, in compassion to the infirmities of his nature, has supposed that he did not enjoy that freedom of will, without which he cannot be justly regarded as a moral agent: *Austin v. Winston*, 1 Hen. & Munf. 33."

Its authority is acknowledged in *Bellamy v. Bellamy*, 6 Fla. 104; *Freeman v. Sedwick*, 6 Gill, 41; *Cushwa v. Cushwa*, 5 Md. 53; *Quirk v. Thomas*, 6 Mich. 111.

In a late case in Maryland, *Roman v. Mali*, 42 Md. 513, decided in 1875, the doctrine was laid down that there may be different degrees of guilt as between the parties to a fraudulent or illegal transaction, and if one party act under circumstances of oppression, imposition, undue influence, or at a great disadvantage with the other party concerned, so that it appears his guilt is subordinate to that of the defendant, the court, in such case, will relieve, which is precisely as held in the principal case; and the counsel, in argument, cited the principal case.

In *Bump on Fraud. Conveyances*, p. 442, it is cited, the author correctly saying: "If a debtor, being in a position where his property is liable to be sacrificed by a creditor, is induced by the latter to make a conveyance to him, relief will be granted on account of the oppression and undue influence."

WIGGLESWORTH v. STEERS.

[1 HENNING & MURFORD, 70.]

INTOXICATION OF PARTY AVOIDS HIS CONTRACT.—A contract may be avoided by the legal representatives of one of the parties, on the ground of his having been drunk when it was made, although such intoxication was not occasioned by the procurement of the other party.

PETITION for a *supersedeas*. Steers, who was addicted to intoxication, and was drunk at dinner, but not through the procurement of Wigglesworth, was prevailed on by the latter, about midnight of the same day, or, as some of the witnesses thought, afterwards, being still drunk, to execute a bond for the conveyance of his lands in this state, in exchange for land in Kentucky. Wigglesworth obtained possession of Steers's lands, but never made any conveyance for those in Kentucky.

though often expressing a willingness to do so when he should receive a deed from Steers. A bill was brought by the heirs of Steers, who died intestate, to vacate the bond, stating that Wigglesworth had no control of the land in Kentucky, and praying a redelivery of the lands of Steers, with an accounting of the profits. All the witnesses agreed that Steers was drunk when the contract was consummated by his entering into the bonds. The county court decreed a redelivery of the lands, but without an accounting of the profits, and this decree was affirmed on an appeal taken to the superior court of chancery.

Botts, on behalf of Wigglesworth, moved for a *supersedeas*, on the grounds that there was adequate remedy at law, and equity had no jurisdiction; that plaintiffs had failed to make out a title under Steers; that though Steers was drunk when he consummated the contract, yet he was not so at the time it was made; and that if defendant did not procure Steers to become intoxicated, the contract could not be avoided: *Powell on Con.*, 29, 30.

The Court, LYONS, ROANE and TUCKER, JJ., denied the *supersedeas*, conceiving that under the particular circumstances of this case, the rule stated from *Powell* would not be infringed thereby; that the bill was sustainable on the ground of vacating the bond; and that on both grounds the decision of the court seemed warranted by *Reynolds v. Waller*, 1 Wash. 164, and other cases.

WITHERINGTON v. McDONALD.

[1 HENING & MURFORD, 306.]

EVIDENCE IMPEACHING PATENT, IN EJECTMENT.—In an action of ejectment, evidence showing that a patent was irregularly obtained, cannot be admitted to impeach such patent.

APPEAL from a judgment of the district court, rendered in an action of ejectment. The plaintiff, McDonald, claimed under a patent dated May 26, 1791; the defendant, under one dated June 28, 1792. On the trial before the jury, the defendant offered evidence to show that the survey upon which the plaintiff's patent was founded was illegal, and also offered to prove that the said patent was obtained upon a certificate signed by a clerk of the land-office, and not by the register, or his deputy. This evidence was rejected, and defendant excepted.

From a verdict and judgment in favor of the plaintiff, the defendant appealed.

Page, for the appellant.

Stuart, for the respondent.

The case of *Hambleton v. Wells*, 4 Call, 213 (2 Am. Dec. 568), in which a question of fraud in the issuance of the patent was raised, being cited and relied upon by counsel.

ROANE, J., observed, that as the case now before the court did not present a question of fraud, he could not think an argument necessary. The court of appeals, in the case of *Hambleton v. Wells*, affirmed the judgment of the district court as to all the points, except that which involved the question of fraud. On that point the judges divided, but he presumed they would have been unanimous on all the other points.

TUCKER, J., then remarked that, as no fraud was alleged in this case, he did not see the propriety or necessity of an argument.

The judges severally delivered their opinions.

ROANE, J. Every point which occurs in this case has already been settled in the case of *Hambleton et al. v. Wells*, and properly decided; I am, therefore, of opinion that the judgment ought to be affirmed.

FLEMING, J., was of the same opinion; he was satisfied that the point had already been settled.

LYONS, J. My own opinion in the case of *Hambleton et al. v. Wells* was, and still is, that at law no evidence can be adduced to impeach a patent. I am for affirming the judgment.

TUCKER, J. There being no suggestion of fraud on the part of the plaintiff in obtaining his patent in this case, we are relieved from the necessity of discussing the decision of this court, in the case of *Hambleton, Bradford et al. v. Wells*, June term, 1791 (2 Am. Dec. 568), in which the defendant offered to prove the plaintiff to have been guilty of a fraud in obtaining his patent, by procuring a plat to be returned to the register's office, knowing that an actual survey had not been made. By a note of that case yesterday, read in court by one of the judges, who copied it from a note of the late President, Mr. Pendleton, it appears that other extraneous evidence was offered and rejected by the court on the trial of that cause, such as a copy of the proclamation of George III, to grant lands to certain officers and soldiers; 2. Testimony of witnesses to show that the deed (perhaps the patent) of the lessor of the plaintiff

was granted to Sarah Gibbs, the representative of John McNaley, and not to the soldier himself, as was necessary by the proclamation; 3. Witnesses to prove an actual settlement by James Cox before the warrant to Gibbs, which settlement was recognized by the commissioners, and an assignment by Cox to Decker. All of which testimony this court appears to have considered as properly rejected. The evidence offered in the present case appears to me to stand upon the same footing. It might, perhaps, have availed upon a *caveat* (a proceeding calculated to prevent the emanation of a patent), where the party applying for it does not proceed in the manner which the law requires; but, a patent being the highest evidence of a complete legal title, and a matter of record, no evidence, not in itself sufficient to avoid it, ought to be admitted to go to a jury on the trial of an ejectment. I am, therefore, of opinion that the judgment be affirmed.

Judges ROANE, FLEMING and LYONS, expressing themselves satisfied with the opinions delivered yesterday, the judgment of the district court was unanimously affirmed.

See *White v. Jones*, 2 Am. Dec. 564, and note.

FISHER'S EXECUTOR v. DUNCAN.

[1 HENING & MURFORD, 563.]

PROMISE BY EXECUTOR NO BAR TO ACT OF LIMITATIONS.—On the trial of an issue on the *assumpsit* of the testator within five years, repeated promises by the executor cannot be given in evidence, to prevent the operation of the act of limitations.

SUFFICIENCY OF EVIDENCE FOR JURY.—The sufficiency of the evidence ought to be left wholly to the consideration of the jury; so, where the court instructed the jury that “from the whole testimony before them, the demand of the plaintiffs was not barred by the act of limitations,” it was held that the instruction was erroneous.

ASSUMPSIT. The principal questions raised were: 1. Whether in an action upon the case against an executor, charging an *assumpsit* of the testator, and on the plea of *non assumpsit* by the testator within five years, the repeated promises of the executor, within five years, to pay the debt, could be given in evidence so as to take the case out of the statute of limitations; and, 2. How far a court may instruct the jury as to the sufficiency of the evidence.

The action was originally brought by Duncan and Turnbull in the county court. A motion made by defendant to strike out all the items of the account which bore date more than five years before the death of the testator was denied, and the court charged the jury that from the whole testimony the plaintiffs were not barred. Verdict and judgment being for the plaintiffs, the defendant appealed to the district court, where the cause was retained for trial upon a reversal and judgment again given for the plaintiffs. From this judgment an appeal was taken to this court. The facts fully appear from the opinion.

G. K. Taylor, for the appellant, urged that the reversal should have been allowed to stand; that the admission of the deposition of John Gholson to prove promises on the part of the executor, when issue was taken upon promises made by the testator, was erroneous; that the *assumpsit* of the executor could not bind the estate, had the executor even given bonds for a debt due from the testator, the action would be brought against him as executor; the promise is binding on the executor's estate only: *Trewinian v. Howell*, Cro. Eliz. 91; *Wheeler v. Collier*, Id. 406; *Atkins v. Hill*, Cowp. 284; *Hawkes v. Saunders*, Id. 289. The reason that the executor by his promise cannot bind the testator's estate is, that were it not so, a fraudulent executor, by combining with creditors, might ruin the estate; and the law has wisely provided, for the executor's security, that such undertaking must be in writing. The court erred in charging the jury as to the weight of the evidence; and should have instructed them to leave out of consideration the items bearing date over five years: *Gaskins v. Commonwealth*, 1 Call, 196.

Hay, for the respondents.

TUCKER, J. On the trial of this cause in the county court of Prince George, the plaintiffs gave in evidence an account of goods, etc., furnished the testator, and also an account against his son John, then under age, for goods, etc., and for board and washing while he was with them in their store, at the testator's request; as also a letter from the testator, stating his objections to those accounts, and submitting himself to the arbitrament of Campbell and Wheeler, or their umpire; the deposition of James Campbell, proving the settlement and adjustment of the account, after hearing both parties, and making some necessary inquiries of a witness; the last article in this account is a credit for nine hogsheads of tobacco, dated January 19, 1794. Campbell further said, that he does not recol-

lect ever hearing that the testator objected to, or complained of, the determination; but, on the contrary, he understood he was satisfied, and acquiesced in the settlement. They also proved that John Fisher was the testator's son, and whilst under age, lived in the plaintiff's store, at the testator's request.

The declaration contained five counts: 1. For *indebitatus assumpsit* for goods sold; 2. *Quantum valebant* for the same; 3. For money lent, advanced, paid, laid out and expended for testator; 4. *Quantum meruit* for meat, drink, and clothes furnished his son; 5. *Insimul computassent* between plaintiffs and the testator. Plea *non assumpsit infra quinque annos*.

The plaintiffs having given the above evidence, the defendants moved the court to instruct the jury that the testimony of James Campbell did not prove any one of the counts in the declaration; but the court instructed the jury that it did prove and support the fifth count; the defendants then moved the court to instruct the jury that the writ bears date February 10, 1799, and that no assumption of the testator being proved after the settlement, the plaintiff is barred by the act of limitations; but the court instructed them that from the whole testimony the plaintiffs were not barred. The defendants then moved the court to strike every item out of the account which bore date more than five years before the testator's death, which was in December, 1794, or January, 1795, which the court refused to do. To each of their decisions an exception was taken. The plaintiffs then further proved, that after the death of the testator, and the qualification of the defendants as executors, they compared the books of their testator with the plaintiffs' account, and found the account to correspond; and this being all the evidence, the defendants moved the court to sign the bill of exceptions (in which all the above matters are stated), which was done accordingly. There was a verdict and judgment for the plaintiffs, from which there was an appeal to the district court of Petersburg, where the same was reversed, and the cause retained there for a new trial, which was had, and a verdict and judgment there, also, for the plaintiffs, from which there is an appeal to this court. I shall consider the exceptions taken in the county court.

1. The testimony of James Campbell is objected to as not proving any of the five counts in the declaration. Now, that testimony must be taken in conjunction with Daniel Fisher's letter, and the account exhibited and settled by himself and Mr. Wheeler, after an examination of the items, both of debit and

credit, in the presence of the parties; and so taken, in my opinion, was proper evidence to be admitted to prove every count in the declaration. For there is a wide distinction between a debt arising from an award—as where a man has an uncertain claim against another for damages in consequence of a tort—and a debt subsisting before the reference to arbitrators, but made certain and conclusive by their award, as in the present case, where the obligation of the father to pay for the board and clothing of his infant son, whom he had in a special manner procured the plaintiffs to receive into their store, upon the same terms as they had received the son of another friend, was to all intents and purposes as binding upon him before the reference, as after the settlement made by the referees. Daniel Fisher's own letter states no other objection to their accounts, which had been, as appears from that letter, in other respects settled. There was, therefore, no ground for the objection to Campbell's testimony, which was, I think, very properly admitted.

2. The second objection is, that the court instructed the jury that upon the whole testimony the account is not barred by the statute of limitations. If the bill of exceptions had stopped here, and it had not afterwards appeared that other evidence was offered to the jury, viz., that since the testator's death the executors had compared the account, proved by Campbell, with their testator's books, and found it to correspond therewith, I should have thought this exception fatal. But we are not to garble a bill of exceptions, and to consider each point in it, as if the jury had been instantly sent from the bar, and had found a verdict accordingly; but we are to take the whole matter therein stated together; and taking this latter piece of testimony with the former, and considering that from the last item in the account to the day of the emanation of the writ was exactly one month only over five years; and that the testator lived twelve months, or near it, after the date of that item, the jury might well presume that entry in the testator's own books to have been made within the five years, and were warranted also in presuming such an entry as an assent to the justice of the account, and a direction to his executors to pay it. For jurors are not bound to draw strict conclusions only from facts, but may and ought to draw such legal conclusions from them as may contribute to the advancement of justice. Taking, then, this last piece of testimony with what had preceded, and considering the jury as acting under the court's instruction,

upon the whole evidence together, and not piecemeal, I incline to think the objection, which would otherwise have been fatal, is cured.

3. The third exception to the court's opinion is, because they did not strike out every item in the account, the date of which was five years previous to the testator's death, pursuant to the act of 1792, c. 92, s. 56. But that clause relates to open accounts only. It was a necessary and proper provision to guard against the numerous claims which have heretofore been brought against the estate of persons deceased, upon such accounts. But here was evidence of an actual settlement between the parties within one year before his death. I, therefore, think the court very properly rejected the motion; and, upon the whole, that the judgment of the county court was substantially right. Consequently, that the district court erred in reversing it, and for that cause the judgment of reversal ought itself to be reversed, and the judgment of the county court affirmed. The last judgment of the district court is unnecessary, under this view of the subject, to be discussed.

ROANE, J. The issue joined in this cause being upon the plea of *non-assumpsit* by the testator within five years, the admission of Gholson's testimony proving repeated promises by the executor in the years 1788 and 1789, in order to take the case out of the statute, was clearly erroneous. On this ground alone the judgment of the district court must be reversed, and it is unnecessary to decide absolutely upon the other points made by the bill of exceptions in the district court. I will, however, state my present impressions respecting them.

With respect to the letter of Fisher and the deposition of Campbell, I am not prepared at present to say that they were not admissible under the fifth count in the declaration, the *in-simul computassent*. The cause of action arose independently of the reference to Campbell and Wheeler, and that reference was only to adjust a disputed item. The parties accounted together in relation to that item, but in so doing, they agreed to call in third persons to state the account between them. On the authority of a passage in Buller, 129, I think it is not necessary that both the parties should personally account together in order to maintain this action; but the evidence in this case shows that both parties were, at times, present at the settlement, and that Daniel Fisher appeared satisfied therewith. There can be no pretense that the defendants could have been surprised with this evidence, because, as well the account ex-

hibited in the county court as that exhibited in the district court, refers to the item in question as having been settled by Campbell; and it was also proved in the trial in the county court that an account exactly corresponding therewith was stated on the books of the testator. The defendants were, therefore, sufficiently apprised that this testimony would be exhibited.

With respect to the last point made in the bill of exceptions, respecting the expunging of all items of more than five years' standing before the testator's death, I am not satisfied that the decision in the case of *Gaskins v. The Commonwealth*, 1 Call, 194, would warrant its being done in the case before us. That limitation of the time had run out in relation to many of the items in the account prior to the passage of the act, and whereas, before the passage of the act, it depended on the will of the defendant to plead the statute (a defense often not resorted to), it became, after this act was passed, imperiously the duty of the court to expunge the items. This would seem to affect the existing rights of the plaintiff, and perhaps bring this case within the reason of the decision in *Elliott's executor v. Lyell*, 3 Call, 268; upon this point, however, I have formed no conclusive opinion.

The county court also erred in their judgment. In the trial there, the defendant moved the court to instruct the jury, that as the writ bore date the tenth of February, 1799, and as no assumption by Daniel Fisher was proven after the settlement by Campbell (which was before the first of January, 1794), the demand was barred by the act of limitations; but the court instructed the jury, on the contrary, that, from the whole testimony before them, the demand was not barred.

There was no testimony before them which warranted such an opinion. The plaintiffs, it is true, proved that after the testator's death, his books were compared with the account and found to correspond, and this is stated (together with other evidence not pertinent to this point), to be *all the testimony* exhibited in the cause, but this last testimony certainly does not prove an assumption by the testator within five years from the time of suing the writ, unless the plaintiffs had further proved that this entry was made within the limitation aforesaid. It may have been made, for anything that appears, more than five years before the suing of the writ; and, if the fact be otherwise, it is the fault of the plaintiff that he did not show it. But on the contrary, the court has admitted that no assumption was proven after the settlement by Campbell. It was proved in the

trial before the district court, that the testator had died more than five years before the date of the writ, viz: in January, 1794. It is true, that in the trial before the county court, whose judgment I am now examining, it is stated in the bill of exceptions, that this death was proved to have taken place in December, 1794, or January, 1795; but this may possibly be a mistake, and may have arisen from the probate of Daniel Fisher's will having been previously shown to have taken place at the last mentioned period, viz: in January, 1795. This is the only ground whereon to reconcile the conflicting opinions of the two courts as to the point in question. But be this matter as it may, if the entry in the testator's books is relied on to take the case out of the statute, that entry should have been shown to have been made or acknowledged within five years before the date of the writ.

It is said that the jury should have been permitted to infer an assumption within five years, from the mere existence of the entry in Daniel Fisher's books. While this position is not admitted, because the jury ought to have had some evidence of an assumption within five years, the county court certainly erred in undertaking to say and instruct the jury that, from this or any other evidence in the cause, the demand was not barred. My opinion, therefore, is, that both judgments be reversed.

FLEMING, J. There can be no doubt, I think, that the district court erred in permitting evidence to go to the jury to prove an *assumpsit* of the executor in an action founded on the *assumpsit* of his testator, the *assumpsit* of the former being no part of the issue between the parties. This seems sufficient error of reversing the judgment of the district court.

With respect to the judgment of the county court, it seems to me that the fifth count in the declaration is well supported in the evidence, and, therefore, the objection of the defendant's counsel, that the testimony did not maintain a single count, is unfounded; nor did the court err in refusing to expunge every item in the account of more than five years' standing, because the testator, not long before his death, by his letter of the sixteenth of November, 1793, acknowledged that he had settled his accounts with the plaintiffs, and complained of no article, except that he thought himself overcharged with the board and other expenses of his son, John Fisher, who had lived in the store of plaintiffs, which he submitted to the arbitrament of Messrs. Campbell and Wheeler, or their umpire. But it ap-

pears to me that the county court erred in having instructed the jury that "from the whole testimony before them, the demand of the plaintiffs was not barred by the act of limitations," which I conceive to have been an improper interference and an infringement on the privileges of the jury, whose right it was to judge of the sufficiency or insufficiency of the evidence adduced to establish any fact or facts in issue before them, the province of the court being to see that all proper evidence offered, and none other, be submitted to their consideration, without saying what effect such evidence ought to have in the cause.

The opinion of the court is, that the judgment of the district court is erroneous, in permitting the deposition of John Gholson to go as evidence to the jury to prove an *assumpsit* of John Fisher, one of the executors of Daniel Fisher, because an *assumpsit* of an executor cannot be given in evidence on the trial of an issue on the *assumpsit* of his testator within five years.

The judgment is, therefore, to be reversed and annulled, and this court, proceeding to give such judgment as the said district court ought to have given, a majority of the court is of opinion that the county court erred in instructing the jury that "from the whole testimony before them, the demand of the appellees was not barred by the act of limitations," as the sufficiency of the evidence ought to have been left wholly to the consideration of the jury.

The judgment of the county court is also to be reversed with costs, and the cause remanded to the said district court for a new trial to be had therein, with directions that no instruction is to be given to the jury, on such trial, respecting the sufficiency or insufficiency of the evidence.

On the point of the sufficiency of evidence being a question for the jury, the case is cited in *Hickman v. Jones*, 9 Wall. 202.

See *Cobham v. Administrators* (2 Am. Dec. 612), as to promise made by administrator.

WOODSON v. BARRETT.

[2 HENNING & MURFORD, 80.]

BOND FOR GAMING CONSIDERATION VOID.—The assignee of a bond given for a gaming consideration cannot recover, although the assignment was for a valuable consideration, and he had no notice of the origin of the bond; unless the obligor before the assignment should induce him to take the bond by a promise to pay the money due thereon.

APPEAL from a decree in chancery dismissing appellants' bill,

praying an injunction. The bill was filed to stay the issuing of an execution upon a judgment recovered against the complainant, Royster, a sheriff, for the defective levy of an execution upon lands of Woodson, by virtue of a judgment obtained by Barrett & Co., as assignees of a certain bond, which complainants allege was void, being given for a gaming consideration. The facts relating to this bond appear from the opinion.

Wickham and Randolph, for the appellants.

Copeland, for the respondents.

TUCKER, J. The bill states, that in 1783, Miller gamed with the appellant Woodson, and won of him one thousand four hundred pounds in officers' certificates; that Jouitt had won about the same sum of Miller; that Miller requested Woodson to pay Jouitt the one thousand four hundred pounds, and that Woodson gave his bond to Jouitt for that sum, Jouitt at the time knowing that it was for this gaming debt. This bond was afterwards assigned to Barrett & Co., who say they had no information that the bond was for gaming at the time of the assignment, nor does Barrett, who alone answers, admit that it was founded on a gaming consideration. The proof that it was, is very abundant.

The question upon this case is, whether the assignee of a bond given for money won at gaming, for a valuable consideration, without notice of the nature of the debt, is barred from recovering the money, by the act to prevent unlawful gaming.

By the acts of 1748, c. 25, and October, 1779, c. 42, all promises, agreements, notes, bills, bonds, or other contracts, judgments, mortgages, or other securities or conveyances whatsoever, where the whole or any part of the consideration shall be for money, or other valuable thing whatsoever, won at gaming, or for the repayment of money lent to game with, shall be utterly void, frustrate, and of no effect, to all intents and purposes whatsoever.

It may not be amiss to observe, that although our statute is generally supposed to be a transcript from the statute of 9 of Anne against gaming, yet there is a material difference between them in the insertion of the word contracts, in our law, which was omitted in the statute of Anne. It was upon the omission of that word in the statute, that the judgment in *Robinson v. Bland*, 2 Burr. 1077, and 1 W. Bl. 234, 256, proceeded. But, even in that case, the court held that the bill of exchange which Sir John Bland drew upon himself in France, payable at ten

days' sight in England, was a void security, and no recovery could be had upon it against his administrator, he dying in France, without returning. In the case of *Bowyer v. Bampton*, 2 Strange, 1155, it was decided, that the innocent indorsee of a gaming note cannot recover against the drawer. And the same decision was made as to the innocent indorsee of a bill of exchange drawn for money won at gaming, in *Lowe v. Waller*, Douglas, 713. The decisions in the cases of *Rawden v. Shadwell*, Ambler, 269, and *Bones v. Booth*, 2 W. Bl. 1226, proceed upon the same principle, that the security is absolutely void. Now, where any instrument is absolutely void in its creation, it cannot, I conceive, be made valid by any subsequent transaction immediately arising out of it. It is not like a security given by an infant, which is only voidable; for that may be revived by a promise after he comes of age. In the cases of *Buckner v. Smith* (1 Am. Dec. 463), *Hoomes v. Smock*, 1 Wash. 299 and 389, this court relied on particular circumstances in the conduct of the defendants respectively, which distinguished those cases from the general principle settled in those I have before cited. There are no such circumstances in this. The naked question is, whether the mere want of notice that a bond or other security was given for money won at gaming, will entitle the assignee without notice to recover in an action brought upon a bond. I am of opinion that it will not, and I conceive that a contrary decision would be tantamount to a declaration that the statute against gaming was of no force or obligation whatsoever. Those who deal in bonds, if thus given, or who allow a valuable consideration for them to persons, with whom or whose circumstances they are unacquainted, ought to be well assured that they are such as are not illegal. If they take them upon the credit of the assignor, they may have their remedy against him, if they have given a valuable consideration, and the money is not recovered. The circulation of gaming bonds is an evil no less to be discountenanced than the giving of them. And no means are more likely to prevent the giving of them than to put an effectual stop to their circulation. I am, therefore, of opinion, that the decree of the chancellor ought to be reversed, and a perpetual injunction awarded, as to both judgments; for the first against Woodson being void, no damages can be given against the sheriff for any errors he might have committed in levying the execution founded thereupon.

ROANE, J., said it was a plain case; and that, in his opinion, there was less reason for taking it out of the statutes against gaming, than appeared in the cases cited from Washington.

FLEMING, J., concurring, the decree was reversed, and injunction made perpetual.

TURPIN, ADMINISTRATOR, v. THOMAS.

[2 HENNE & MUMFORD, 139.]

RELIEF IN EQUITY AGAINST JUDGMENT AT LAW.—A court of equity cannot relieve against a judgment at law, merely on the ground that it was erroneous, and though the plaintiff at law was not entitled to recover, or not entitled in that form of action, and the judgment was obtained by default. To grant relief in such cases, there must be some suggestion of fraud or surprise, or some good reason assigned for the failure to make a defense at law.

APPEAL from a decree of the superior court of chancery, dismissing appellant's bill. The case is stated in the opinion.

Randolph, for the appellant.

Hay, for the respondent.

TUCKER, J. This cause having abated by the death of one of the parties, was revived, by consent, last term, against the representatives of the party deceased, without naming them. The cause was now called for hearing, no person having been made defendant by name, in consequence of that order. I was of opinion we ought not to proceed to a hearing of the cause until the parties were before the court by name. Judge Roane cited *Southal v. McKeand*, 1 Wash. 339, which appeared to me to be in favor of my idea. He seemed to think the trial might proceed. Judge Fleming concurring in opinion with me, another cause was called. But Mr. Hay afterwards suggested that there was a Mr. Thomas, who was either executor or administrator. The cause was opened; but the court seemed to agree that in future no cause should be considered as revived until some person should be named as a party representing the party deceased.

The case appears to be this: One W. C. Hill, in May, 1772, or 1773, being a deputy sheriff in the county of Cumberland, for James, the appellant's intestate, who seems in his bill to admit that he was then high sheriff of that county, subscribed a paper, headed thus: "Sheriff of Cumberland, Jesse Thomas's ticket list," to which he subjoined a receipt as follows: Received

tickets agreeable to the above list, which I promise to collect, or return according to law. W. C. Hill, D. Sheriff," without saying for whom. On the twenty-fifth or twenty-sixth of July, 1785, Thomas obtained a judgment without opposition, on motion, against James, the high sheriff, for the amount of these tickets. After which, James moved for judgment against Hill, his deputy; but his motion was overruled, because, as he alleges in his bill, it appeared to the court that the receipt had been discharged by Hill himself, Thomas, though not a party, being present and cross-examining the witnesses. Of this last circumstance, there is no proof, that I have discovered, in the record. James, in the year 1797, obtained an injunction to a judgment upon a writ of *scire facias* sued out by Thomas upon the first judgment, and upon the hearing the chancellor dismissed the bill, with costs, upon which James appealed to this court.

That the judgment against James was erroneous, and might have been reversed at law, appears sufficiently clear to me from the circumstances. The fee bill, L. V. 1745, c. 1, was a temporary act. It had been twice continued before James was high sheriff. It expired in May, 1774, was revived and continued in October, 1777, and October, 1778, when it again expired, and was again revived in October, 1782, and continued for two years, when it expired, and was again revived in October, 1785: L. V. 1745, c. 38. The judgment obtained by Thomas was in the interval between the last mentioned expiration and the revival thereof; consequently, the remedy by motion did not exist at that time, even if the judgment were right upon the merits.

A second reason why the judgment as against James was erroneous, and might have been reversed at law, appears to me to be this: The sheriff is not bound by law to collect the fees which may be due to his predecessor in the same county; the law obliges him to collect the fees due to surveyors, clerks, and to the sheriffs of other counties, but makes no such provision in favor of preceding sheriffs of the same county, who were authorized, by the twelfth section of the act, to collect and distrain for their own fees, as well as for those due to sheriffs of other counties. Of course, James, as high sheriff, not being bound in duty to collect the fees due to his predecessor, in virtue of his office as sheriff, the undertaking of his deputy to collect them was not an official act, but a mere personal undertaking, for which James was in no manner whatsoever liable. The judgment consequently was erroneous upon this ground

also. But instead of appealing from that judgment to a court of law, or applying for a writ of error, or of *supersedeas* to reverse that judgment, he has obtained an injunction from the chancellor, I presume, upon the usual terms of releasing errors. This brings the case precisely to that of *Branch v. Burnley*, 1 Call, 147, and the question is, whether the appellant, under these circumstances, is entitled to the relief that is sought.

The only grounds upon which one man can be bound to answer for the undertaking and default of another, is where he has expressly bound himself to do so, or where the law, by reason of some official connection or other relationship between them, so far identifies them together, as to consider the act of the inferior as the act of the superior. This is the case with sheriffs and their deputies in every instance where the law imposes a duty upon the sheriff, *virtute officii*; but, where the law does not impose a duty, in that manner, the sheriff and his deputy are distinct persons, and the high sheriff is no more responsible for the acts or undertakings of his deputy, than for those of any other person whatsoever. I have already stated that this was a mere personal undertaking of Hill's, and not an official one, by which his superior was bound. The judgment is therefore against equity as well as against law. This, I apprehend, distinguishes it very materially from the case presented by the bill of *John Whiting v. Maupin*, 1 Call, 224, where Whiting wished to avail himself of the circumstance of his not having signed the replevy bond, upon which, as I understand the case, judgment had been obtained against him; the court said, if he was not bound at law, his not having signed the bond was a legal defense of which he should have availed himself upon a motion for a judgment on the bond, and not have resorted for relief, on that ground, to a court of equity, where the case is to be decided upon its real justice, and not on the omission of strict legal ceremonies. In that case the plaintiff had not indeed signed the bond; but, on its being shown to him with his name thereto, said he supposed he must be his father's security, and acknowledged it. This court said that, upon that view of the case, Whiting had no pretense of equity, and dissolved the injunction. It is also, I think, distinguishable from the case of *Terrell v. Dick*, 1 Call, 546, in this, that no defense was made; whereas, in that case, the question of law was fully argued at the trial, and no steps were taken to carry the cause before an appellate court of law. In this case, the complainant seems to be wholly ignorant that he was neither bound at

law nor in equity, for the acts of Hill, in this particular instance. He supposed himself bound thereby, and made no defense at law; nor does he even suggest this in his bill, as a ground for relief in equity. Under these circumstances, I strongly incline to think that this case differs materially from any of those in which relief has been refused in equity. But as a majority of the court is of a different opinion, and as I concur perfectly in the grounds upon which former decisions upon this question have been made, I shall acquiesce in their opinion without further observation.

ROANE, J. Whether James, the high sheriff, was liable to the judgment of the appellee for the fees in question; or liable in that particular form of action, is a question completely and emphatically legal. If determined erroneously, that decision must still bind, until duly reversed by a court of law; and a court of equity cannot relieve against the judgment on the mere ground of this error. It is a question which is not cognizable by that tribunal. It cannot do this, however palpable it may conceive the error to be; for if its jurisdiction is admitted in plain cases, it will go on to adjudge what cases are plain, and the functions of the appellate court of law will be entirely superseded. It is believed, that no difference exists in this respect between a judgment suffered by default, and one obtained upon a verdict.

The doctrine just mentioned was fully settled by this court, upon argument, and a full consideration of all the preceding cases, in the case of *Terrell v. Dick*, 1 Call, 546. In that case, the jurisdiction of the chancery was disclaimed, under strong circumstances, rather than (in the language of the President) "to fix a precedent wholly destructive of all distinction in the common law and chancery jurisdiction."

Considering the natural and progressive tendency of the jurisdiction of the chancery to encroach upon that of the common law courts, and thus not only to lose the advantages of jury trial and *viva voce* examination, but also to give a man the benefit of his own testimony, that jurisdiction, however salutary and valuable, should not be extended to the overthrow of the jurisdiction of the courts of common law; nor ought the land-marks established by this court, in relation to this subject, lightly to be departed from.

Upon this ground of error, then, the appellant is not entitled to relief; but, indeed, he has not himself taken this ground in his bill, but has merely charged therein, that the money recovered against him had been previously paid. I may here ask why

this defense was not used at law; it being a clear principle, that discount shall not (without assigning some reason) be first set up in equity? The case of the appellant is, therefore, incomplete in this respect. But, waiving that objection, the answer of the defendant has expressly denied the payment, and that answer is powerfully supported by the testimony of Theodorick Scruggs. Scruggs states, that Hill, after the time mentioned by Flippen and Carrington, admitted that he had not paid the money due for the tickets, but said that James "had taken and collected the tickets, and ought to pay for them." If this be the fact, certainly the judgment cannot be said to be inequitable. This answer and deposition, therefore, entirely outweigh the testimony of Flippen and Carrington (upon which the county court probably went in the case of the motion against Hill), but that testimony taken singly, is, at least, equivocal and inconclusive, whereas that of the answer and of Scruggs is positive and affirmative. This latter testimony must therefore prevail; and, on the merits, the judgment of the appellee ought not to be enjoined. The appellee ought not to be at all affected by the decision in the county court, in the case of *James v. Hill*, as he was no party to that controversy; although (happening to be present) he may have interfered in cross-examining the witnesses. He is not to be estopped by that decision, unless, like other parties, he had had a full, fair and previous opportunity to meet the question in controversy.

As to the lapse of time prior to 1785, it is accounted for by the existence of paper money, and the revolutionary war. The delay afterwards is ascribed by the appellee to the existence of the appeal, to his infirmities, and the death of the complainant. As to these, we have no certain data (which, if they would help his case, ought to have been furnished by the appellant) from which to infer that the delay evinces that the present claim is unconscionable. The same remark applies to the insinuation that the appellee had lain by until the death of Hill, with the view of taking advantage of that circumstance; the record being wholly silent as to the time of this death.

I am, therefore, of opinion that the decree be affirmed.

FLEMING, J. The case of *Terrell v. Dick*, in this court, 1 Call, 546, seems to have settled the principle, that a court of equity will not interfere in a case purely of a legal nature, on the ground that the judgment at law was erroneous, where neither fraud nor surprise is suggested, nor any adventitious circumstance had arisen. In the case before us, James, the intestate

of the appellant, though he had due notice of the intended motion of Thomas, failed to appear and avail himself of the law that seemed then to be in his favor, and, without any defense, suffered a judgment to pass against him, contenting himself, as he states in his bill, that he would have recourse against Hill, his undersheriff, not knowing but he was really in arrear to Thomas, on account of the receipt he had previously given him for sheriff's fees. But his motion against Hill and his securities, made at a subsequent day, was overruled, the court stating that the receipt aforesaid was discharged by the said Hill. And whatever injury James, the appellant's intestate, may have sustained, it seems to have arisen from his own inattention and negligence; and were this court, as a court of equity, to interfere, it might tend to fix a dangerous precedent, destructive of a proper distinction between the common law and chancery jurisdiction. Upon this ground, without considering the merits of the case, I am of opinion that the decree ought to be affirmed.

By the whole court (absent Judge Lyons), the decree of the superior court of chancery affirmed.

NELSON v. MATTHEWS.

[2 HENING & MURFORD, 164.]

QUANTITY OF LAND SOLD DEFICIENT—RELIEF.—A vendor who conveys a tract of land with a general warranty, as containing an estimated quantity, more or less, when his own title papers were for less than such specified quantity, is bound to make good the difference to the purchaser. But a deficiency of eight acres in a tract of five hundred and fifty-two acres, is no more than a purchaser who buys for more or less may reasonably expect.

DEFICIENCY—MEASURE OF DAMAGES.—Where land is sold with warranty, and there is a deficiency in the quantity, the purchaser is entitled to compensation for such deficiency, the value being estimated at the time of the contract, and not at the time when the deficiency was discovered.

SAME.—If several adjoining tracts of land be sold for a gross sum, and no specification be made at the time of the contract of the quality or separate value of each parcel, and there be a deficiency in the quantity of each tract, the purchaser will be entitled to compensation for the deficiency, according to the average value of the whole tract, and not of the several tracts taken separately.

APPEAL from the superior court of chancery. The facts are stated in the opinion.

Wickham, for the appellant.

Call, for the respondents.

TUCKER, J. Nelson, who was at that time a resident of Richmond, purchased of Matthews a tract of land in Augusta county, said by him to contain five hundred and seventy-two acres, which he held by deed; with a valuable mill and other improvements thereon, together with two surveys adjoining the former tract, the quantity not known at the time of the bargain, but supposed to contain about two hundred acres. A deficiency in all three of these tracts being suggested by Nelson, who brought a bill in chancery to be relieved from a judgment obtained on one of the bonds given by him for the purchase-money, the chancellor directed a survey; and also an estimate of the value of the two small surveys, as connected with, and as an appendage to, the larger tract on the day of the bargain, and also on the day the money became due upon the bond. The commissioners made a special report, by which it appeared that the larger tract contained only five hundred and forty-four acres, and that the conveyance for the same from R. Lockhart to Sampson and George Matthews, was for five hundred and fifty-two acres only; that one of the small surveys for forty-four acres was entirely lost; and that fifty-one acres of the other small survey were in fact comprehended within the lines of the large tract. They then report the average value of each parcel on the days before mentioned, together with their opinion as to the relative value of the small tracts as an appendage to the large one. The chancellor pronounced a decree that Nelson was entitled to a discount for twenty acres, the difference between the quantity expressed in Lockhart's deed to Matthews and in that of Matthews to Nelson; but not for the deficiency of eight, such deficiency not being more than a purchaser in gross might reasonably expect; and that the plaintiff was further entitled to a discount for the value of the forty-four acres, and fifty-one acres, which ought to be fixed according to the value at the time of the contract, and not at any subsequent period, and according to their real and not their relative value; with some further discounts not contested in this court.

If the quantity in each separate tract had been exactly that which the parties supposed at the time of the contract, and the real value of each tract, respectively, had at that time corresponded with the valuation of the commissioners, the appellant would have got five hundred and seventy-two acres of the value

of six dollars and seventy-five cents each, forty-four acres of the value of four dollars, and one hundred and fifty-six acres of the value of two dollars and twenty-five cents each; amounting, in the whole, to four thousand three hundred and eighty-eight dollars and fifty cents, the average value of which would be five dollars and sixty-eight cents and nearly one-half of a cent; at which rate, I conceive, the complainant ought to be allowed a deduction upon one hundred and fifteen acres, the quantity deficient, and with this amendment, I think the decree ought to be affirmed, in the same manner as was done in the case of *Pendleton v. Vandevier*, 1 Wash. 389.

It may not be amiss to add, that there appears to have been no actual specification made at the time of the contract of the quality or separate value of these several parcels of land, by the seller to the buyer. They were represented as adjoining each other, and Nelson probably thought the quality of all three the same in general. Upon these grounds, I think the average value of the whole, as estimated by the commissioners, taken together, is the proper rate at which the allowance for the deficiency ought to be made; that deficiency arising in part from the interlocking of the smaller tracts with the larger, as well as from a want of quantity within the actual boundaries of the lands. If, indeed, there had been the full quantity of the land in each tract, and Nelson had been evicted of a part of it by a title superior to that of Matthews, the proper estimate of his damages would have been according to the actual value of the land recovered, for then it might have been precisely known; but it is impossible, in the present case, to ascertain the value of the deficiency in quantity, otherwise than by reference to the average value of the whole.

I concur also in thinking the chancellor perfectly right in fixing the value of the deficiency at the time of the contract. Whereas if the money had been paid, and then the purchaser had been evicted by a superior title, I should have thought the value ought to have been fixed as it might have been at the time of the eviction.

ROANE, J. The decree of the chancellor is right so far as it considers the actual value of the lost land, and the time of the purchase, as affording the proper standard for estimating the compensation in this case. If the question of compensation were now submitted to a jury on an issue of *quantum damnificatus*, the actual value would alone be regarded, and not the value which may have been set upon the land by the purchaser,

or the price he agreed to give for it. So with respect to the time, the date of the purchase gives the rule; the loss existed from that time, and the value of that loss with interest gives the true measure of compensation; unless indeed there were such special circumstances in the case as would make it proper to depart from that criterion.

I differ, however, from the chancellor, in supposing that the average value of the land lost in the several tracts, taken separately, gives the rule. For anything known to us, the lands in question, although contained in three tracts, were considered as one tract, and purchased in gross. This is the more probable, because, as they adjoin, they in truth do form but one tract. Their being held by separate rights makes no difference. I cannot differ this case then from the general case of the purchase of a tract of land in which a deficiency is found to exist, and in which the average value of the whole tract gives the rule.

There may be circumstances in which this general rule ought to be departed from, and in which the loss ought to be considered in a relative point of view. This (in the opinion of the commissioners) is one of those cases; but from the plaintiff's own showing, it is not such a case. He does not state that the lost land, now in question, formed a particular inducement with him to make the purchase; on the contrary, he says that "he had never viewed the land, but relied on the information of Matthews as to quantity and boundaries." He does not even say that he asked or received any information as to quality and description. Not having asked this, he submits, in case of deficiency, to stand upon the general ground. That ground is a safe one, inasmuch as it gives the average value of an article purchased in gross; whereas, when we inquire into the relative value, we enter into a very extensive field, where much is left to opinion, and in which there are no certain *data* to go by. I am far from saying, however, that that standard is in no instance to be resorted to. I only say, that in this case, I see no reason to depart from the general principle. I am, therefore, of opinion to reform the decree by resorting to the average value, per acre, of the whole land purchased, and to affirm it for the residue.

FLEMING, J. Two important questions seem to arise in this case: 1. Whether the compensation to be made for the deficiency in the quantity of land be according to the value in the year 1785, when the contract was made, or according to the value in the year 1798, when the commissioners made their first

estimate; and, 2. Whether such compensation be according to the real or relative value of the lands lost to the purchaser?

With respect to the first point, I have no difficulty in saying that I think it ought to be according to the value in February, 1785, the time of the original contract, and not at any subsequent day, because the compensation ought to be in proportion to the price given for the land.

The second point seems to be attended with more difficulty, and I was at first inclined to think that there ought to be a liberal allowance for the forty-four acres of timbered land adjoining the large tract on the northwest, stated by the commissioners on their first view, to have been worth four dollars per acre in the month of February, 1785 (the time of the contract), and which was totally lost to the purchaser; but, on conferring with the other judges, and on more mature reflection on the subject, it appearing from the record that the appellant contracted for seven hundred and seventy-two acres, in the whole, for the gross sum of two thousand pounds, without noticing any improvements on the old tract, or any peculiar advantage to be derived from any particular part of the purchase; and it not appearing that the forty-four acres of timbered land was any inducement to the contract, of which it is probable Nelson was totally ignorant at the time, as the contract was made in Richmond, the most equitable way of doing justice between the parties seems to be to average the deficiency of one hundred and fifteen acres at five dollars and sixty-eight cents per acre, being the average value per acre of the whole land contracted for, which will give one dollar and sixty-eight cents per acre for the forty-four acres, and three dollars and forty-three cents per acre for the seventy-one acres deficient in the survey adjoining the old tract on the southeast, more than they are stated by the commissioners, in their first report, to have been worth in February, 1785, making in the whole an allowance for deficiency of the sum of six hundred and forty-eight dollars and seven cents, which is two hundred and three dollars and sixty-three cents more than was allowed by the decree; and with interest at five per cent. per annum to the first of April, amounts to four hundred and two dollars and eighteen cents. I am of opinion that the decree ought to be reversed, so far as it respects the compensation for the deficiency in the land contracted for, and reformed according to the principles of the decree which has been agreed upon in conference.

The following was entered as the decree of the court: "This

day came the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid, and the arguments of counsel, is of opinion that the said decree is erroneous in this, that it allows only the sum of four hundred and forty-four dollars and forty-four cents, with interest thereon from the first of October, 1788, as a compensation for the deficiency of one hundred and fifteen acres in the land contracted for by and between the said parties, on the eleventh day of February, 1785, but that there is no other error in the said decree. Therefore, it is decreed and ordered, that so much thereof as is above stated to be erroneous be reversed and annulled, and that the residue thereof be affirmed, and that the appellees pay to the appellant his costs, by him expended in the prosecution of his appeal aforesaid here. And this court proceeding to make such decree in lieu of that part of the decree aforesaid, before reversed, as the said court of chancery should have pronounced, it is adjudged, ordered, and decreed that the injunction obtained by the appellant to stay execution of a judgment recovered against him by the appellee Matthews in the district court holden at Staunton, be made perpetual for six hundred and forty-eight dollars and seven cents, being the compensation for the deficiency of one hundred and fifteen acres in the land contracted for by the said appellant with the said appellee Matthews, at five dollars and sixty-eight cents per acre, being the average value of the whole seven hundred and seventy-two acres contracted for by and between the said parties; and, also, for interest on the same at the rate of five per centum per annum, from the first day of October, 1788, the time when the appellant's bond, on which the judgment has been obtained, became due."

See *Jolliffe v. Hite* (1 Am. Dec. 519); and *Pringle v. Witten's Executors*, Id. 612. As to the effect of the words, "more or less," it is cited in *Stebbins v. Eddy* 4 Mason, 419.

FITZHUGH v. ANDERSON.

[2 HENING & MURFORD, 289.]

POSSESSION AN INDICIUM OF OWNERSHIP.—A father, when there was no statute of frauds, delivered certain slaves to his son, which by parol evidence alone were shown to have been loaned for an indefinite period, and the son having retained uninterrupted possession for many years, used the property as his own, acquiring credit by reason of such possession. In a controversy between the father, or volunteer

claimants under him, and creditors of and purchasers from the son, the father shall be deemed to have given him the slaves, and on general principles of law and equity, independent of any statutory provision, the title of such creditors or purchasers will be protected; and the fact that the father afterwards by his last will and testament bequeathed the slaves to his son for life, remainder to his children, makes no difference in the case.

STATUTE OF LIMITATIONS WHEN NOT SUSPENDED.—When the statute of limitations once begins to run, its operation does not cease by the intervention of infancy, coverture, or other legal disability.

APPEAL from a decree of the superior court of chancery dismissing appellants' bill. The case is stated in the opinion.

Wickham, for the appellants.

Randolph, for the respondents.

TUCKER, J. William Fitzhugh, of Marmion, in King George county, about the year 1772, put his eldest son, John, in possession of sundry slaves, which he carried first to Caroline county, and afterwards to Amherst. He some years after sold one of them to Thomas Anderson and another to Taliaferro. About eighteen months after his removal to Amherst, several of them were taken and sold under an execution. John forbade the sale, which took place in 1788. William never brought suit in his lifetime for any of them; but by his will, dated in March, 1789, and proved in June, 1791, he bequeathed to his son John "all the negroes which he had hitherto lent him during his life, and at his decease the whole of them and their increase to be equally divided between his two eldest sons now living by his present wife." The appellants are those sons, who have brought a suit by their guardian against the purchasers and their descendants for those slaves and their increase. There is no evidence in the record that the slaves were given to John Fitzhugh by his father; on the contrary, the evidence of the delivery to him seems to show that it was intended by the father as a loan only. Some of the defendants have pleaded the act of limitations; they all insist that they are fair purchasers. The chancellor was of opinion, "that the father, having suffered his son to remain so long in possession of the slaves to his own use, ought to be deemed in a controversy between himself, or volunteers under him, and creditors of the son, or purchasers from him, to have given him the slaves, unless his possession had been, under some written act, registered within a reasonable time and in a proper court, shown to have been fiduciary, or no more than usufructuary, by some written publication in solemn

form premonishing people with whom the son should deal that he was, although the visible, not the real owner;" and dismissed the bill, with costs, etc., from which decree the complainants have appealed.

The lapse of time between the loan, if in fact it were a loan, of the slaves by the father to the son, being nearly or quite twenty years, the period between the sale of those sold by John Fitzhugh and the father's death being equal to that which the act of limitations makes a perpetual bar to the action for the recovery of them by the father; and that which elapsed between the taking them and selling them under execution, and the death of the father, being little short of that which constitutes a bar to such recovery, I strongly incline to approve of the chancellor's opinion and decree throughout. I have no hesitation in thinking it ought to be affirmed as to those defendants who have pleaded the act of limitations. And upon the principles of public policy and utility, I think it ought to be affirmed as to the others. Five years peaceable possession of a slave will operate as a bar to the recovery by the former owner, unless some express bargain or agreement be proved, showing that the possession of the holder is, in fact, the possession of him who claims the absolute property. If no such proof be adduced, the law construes the property to be in him who hath the unqualified possession for such a length of time. And as to the creditors of the holder who may have acquired a title under an execution, and as to purchasers either at a public sale under execution, or from the holder himself, an acquiescence in their titles and possession thus acquired, seems to me to be a legal bar, and equally one in equity. The gift to the grandsons can have no reference to any period antecedent to the death of William Fitzhugh; for no remainder in a slave could have been created by any verbal gift, made at the time of the delivery to John Fitzhugh, and none is pretended to have been made by deed; and the devise in the will, I consider as merely void and ineffectual, after such a long period as intervened in this case. I am therefore in favor of an affirmance of the decree.

ROANE, J. The first part of the second section of the act of 1785, to prevent frauds and perjuries, Rev. Code, vol. I, pp. 15, 16, in relation to conveyances, etc., to defraud creditors and purchasers, was taken from, and intended to be co-extensive with, the English statutes of 13 Eliz., c. 5, and 27 Eliz., c. 4. This is not only evident from comparing it with them, but has

also been decided by the supreme court of the United States, in the case of *Hamilton v. Russell*, 1 Cranch, 309. In that case the court, moreover, said, that those acts of parliament are to be considered as only declaratory of the principles of the common law. The court of king's bench had, previously, in the case of *Cadogan v. Kennett*, Cowp. 434, declared that the principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end by the said statutes, and that these statutes cannot receive too liberal a construction, or be too much extended in suppression of fraud. It is added, in the same case, that many things are considered as circumstances of fraud; that the statute says not a word about possession, which is also the case with the clause of our act of assembly now in question; but that the law says, that if after a sale of goods, the vendor continue in possession, and appear as the visible owner, it is evidence of fraud, because goods pass by delivery.

It has since been decided in *Edwards v. Harben*, 2 T. R. 594, as well as in the before-mentioned case of *Hamilton v. Russell*, in which our act of 1785 was directly brought into question, that unless possession follows and accompanies the deed, such deed is adjudged to be fraudulent; that in the case of an absolute and unconditional deed, that cannot be said to be the case where possession is retained by the vendor; and the decision in *Cadogan v. Kennett* is justified in the case of *Edwards v. Harben*, by considering that the possession was consistent with and accompanied the deed made in that case in favor of the wife. Both these authorities also show, that where the deed is absolute, the retaining the possession is *per se* fraudulent in point of law, and not merely an evidence of fraud.

These cases go to show, that the statutes in question are merely supererogatory in relation to the common law; that the decision respecting the separation of the possession from the title, thus adjudged to be in itself fraudulent, does not result from the terms of the statute, but from the general principles of law; that the only cases in which such cases can stand justified, are those in which the possession is consistent with, and called for by some deed under which the property in question is limited and claimed, and that the reasons upon which the said statutes are founded cannot be too much extended for the purpose of suppressing fraud. Upon the point of possession also, it will be seen, not only that possession is every-

where considered as the *indicium* of property, in relation to personal goods, but also that the third point resolved in *Twine's case*, 3 Co. 80, is, "for that the donor continueth in possession and useth them" (the goods in question) "as his own" (as in this case), "and by reason thereof he tradeth and trafficketh with others, and defrauds and deceives them." The general principle arising out of the above decisions, when simplified, is, that an unqualified contract, whereby the possession of goods remains in one man, and the right in another, is fraudulent, not only for the reason so emphatically expressed, *ut supra*, from *Twine's case*, but also, because, as is above said in the case of *Cadogan v. Kennett*, "goods pass by delivery;" and in the case of *Hamilton v. Russell*, it will be seen that no difference in this respect exists between slaves and other goods.

Is not the above precisely the definition of the case before us? While the possession exists in the son, does not the right exist in the father? It existed in him always, because the testimony does not show that he lent the negroes to his son for any given time, and therefore might at any time have resumed the property. While it is agreed that so much of our act as I have just referred to, was taken from the two English statutes of Elizabeth, I cannot see that the latter part of the section in question finds any correspondent provision in any English statute. I mean the part respecting the recording of agreements made on consideration not deemed valuable in law, and that respecting goods loaned. The clause respecting goods loaned is as follows: "And in like manner, where any loan of goods or chattels shall be pretended to have been made to any person, with whom, or those claiming under him, possession shall have remained by the space of five years, without demand made and pursued by due process of law, on the part of the pretended lender, or where any reservation or limitation shall be pretended to have been made of a use or property, by way of condition, reversion, remainder, or otherwise, in goods and chattels, the possession whereof shall have remained in another as aforesaid, the same shall be taken as to the creditors and purchasers of the person aforesaid so remaining in possession, to be fraudulent within the act, and the absolute property is with the possession, unless such loan, reservation or limitation of use or property were declared by will or by deed in writing, proved and recorded as aforesaid."

On this clause, which, being posterior to, does not embrace our case, I will remark, that this provision, or one similar in

principle, however indefinite as to detail or modification, may as justly and naturally be deemed to have resulted from the general principles of law, as that just noticed in relation to the first branch of this section, and was intended to put an end to all future litigation depending upon the point of possession only. Considering that the wide field carved out for perjury and litigation by the indefiniteness of the principle in relation to possession, would be productive of much public inconvenience, our act of frauds has improved upon that of England, by extending itself into this subject also, and establishing one certain standard in relation to possession in respect of loans. In utility and in principle, this provision is analogous to that beneficial one in the same act which relates to sale of lands, marriage-agreements, etc. But I take the law always to have been in this country and in England, and which probably is not changed or affected by the before cited passage from the act of 1785, that whilst loans of personal goods were permitted, the borrower keeping himself strictly within the pale of his authority in relation thereto, yet, whensoever he should overstep the limits of his character of borrower, act as owner over them, or sell them, especially with the knowledge and consent of the lender, he should be taken to be the owner in reference to all those who may have been drawn in by these acts to give him credit; and that in such a case, the lender is not to be permitted, by his neutrality and connivance, to aid in the perpetration of a fraud.

In considering this case, therefore, as anterior to the operation of our act, while I do not feel myself at liberty to take, in relation to loans, as bold a ground as is above taken, under the statute of Elizabeth, in relation to conveyances, namely, that a separation simply of the possession from the right for any portion of time, shall be held to be fraudulent, I have no hesitation to say that if the borrower, with the knowledge and consent of the lender, departs from his true character, and, in the strong and just language in *Twine's case*, "useth the goods as his own, and by reason thereof tradeth and trafficketh with others, and defrauds and deceives them," the lender, and all volunteers under him, shall be bound thereby.

As to the facts in the case before us, although Mrs. Fitzhugh and Allison prove William Fitzhugh's intention to lend the negroes to John Fitzhugh for his life, there is no testimony to show that, in fact, any contract was made to lend them for any determined period. William Fitzhugh had, therefore, always

the right of property in him; and his right of action accrued, if not from the very time of the loan, at least from the time of the sales in question. William Fitzhugh had not postponed his right to demand these negroes until after his son John's death; and this, perhaps, for I have not looked into it, is an answer to the case stated on this point from Vesey. If William Fitzhugh's right of action accrued, even on the latter event, the plea of the act of limitations is bar in favor of those who have resorted to it. The case of *Grey v. Mendez*, 1 Str. 556, shows that when the five years have once commenced, they run over all mesne acts, such as coverture, infancy, etc. But I return to the merits of the case.

It is indeed proved by some of William Fitzhugh's overseers and members of his family, that these negroes were only lent; and this was also probably known to a few others to whom it was mentioned, and, in some instances, by William Fitzhugh's desire. On the contrary, several persons, residing even in the county of Caroline, where the transaction first originated, one of them, too, an overseer of John Fitzhugh, prove that these negroes were considered as John Fitzhugh's property; that he used them as his own, gained credit upon them, and even sold one of them. This sale being known, it was naturally to be presumed, from his near residence, that his father knew and approved of it, and it may not have been equally notorious that this sale was by his special leave, and assented to by him with difficulty. The father, therefore, ought to be bound by this presumption, and the consequences arising out of this circumstance. Besides, he suffered his son, without objection, to remove them into a distant county, in which county, as well as in Caroline, he used every act of ownership over them, and gained credit upon them. John Fitzhugh always, before and after the sale in 1788, spoke of them as his own; and the purchasers at the sale were authorized to consider his conduct at the sale, which was also withdrawn in a conversation with Crawford, who most probably communicated that withdrawal to others, as a fraudulent attempt to evade the execution. I must not here omit to remark, that John Fitzhugh was the eldest son of an opulent father; that this provision, admitting the property to have been absolutely given, was probably but a reasonable advancement to him; and that, therefore, and under the general usage in this respect, the property might naturally and reasonably be taken to have been his own. On the whole, this is a strong case for the purchasers. I cannot differ this claim from

one made for the negroes by the father himself; and if the father himself were before us, no man would hesitate to decree him to abide by the fruits of his own fraudulent conduct, concealment or connivance.

On these grounds, I approve of the chancellor's decree. But I have formed no opinion, as he seems to have done, as to what act on the part of a lender might be proper and sufficient, under circumstances similar to the present, to repel the consequences arising from similar transactions. This is not called for in the present case, and is the less necessary to be settled by the court, as a general regulation, in consequence of the provision before mentioned, as introduced into the act of 1785, in relation to loans.

FLEMING, J., concurred.

Decree dismissing complainants' bill affirmed.

UPSHAW v. UPSHAW.

[2 FLEMING & MUMFORD, 890.]

POWER OF HUSBAND OVER WIFE'S PROPERTY.—A husband dying in the lifetime of his wife, has no right to dispose of slaves by will, to which she is entitled in remainder or reversion, the particular estate not having expired; though he may, in his lifetime, sell his and her interest in them for a valuable consideration.

ELECTION BY WIFE UNDER HUSBAND'S WILL.—Where the husband made a devise of slaves to other parties, in which his wife had a remainder, and a devise of other property to herself for life, with remainder over to others in fee simple, and she took possession of the estate devised to her, held it for many years, and then disposed of part of it to those entitled in remainder in consideration of their enlarging her interest in the residue to a fee simple, she thereby makes her election to accept the provision made for her in the will, and precludes her from also holding the slaves; these circumstances, together with her taking possession of property, being sufficient evidence of her having such knowledge of the two funds, so as to make her election obligatory.

APPEAL from a decree of the superior court of chancery. The facts appear from the opinion.

Hay and Randolph, for the appellant.

Wickham, for the respondents.

TUCKER, J. The appellees filed their bill, stating that John Hunt, being possessed of several slaves and other property, made his will December 28, 1760, whereby he devised to his

sisters, Mary Anne Dillard and Elizabeth Upshaw, the appellant, all his negroes, after the death of his mother, Anne Upshaw, who was also mother of the appellees. That William Upshaw, the husband of Elizabeth, the legatee, on the seventeenth of January, 1761, made his will, whereby he gave to his wife his whole estate, real and personal, during her widowhood, and after her decease to the heirs of James Upshaw, equally to be divided amongst them; and by a codicil, dated in June, 1761, he devised "the negroes in the possession of Mrs. Anne Upshaw, that were given to his wife by her brother, John Hunt; his part he desired might be equally divided among uncle, Forest Upshaw's three children, at their mother's decease." The appellees are those children; and Elizabeth Upshaw, having taken possession of the estate of her husband, William, and enjoyed it more than twenty years, on the death of her mother, Anne Upshaw, possessed herself of a moiety of the slaves devised to her by her brother, J. Hunt; to recover which is the object of the bill. The appellant admits the wills of J. Hunt and William Upshaw, but contends the latter had no right to bequeath the slaves in question, he having died in the life of Anne Upshaw, who held them as dower. And that she was obliged to pay, together with James Dillard, her sister's husband, the sum of seventy-seven pounds, sixteen shillings and four and a half pence, towards the discharge of John Hunt's debts, for which these slaves were liable and advertised by the administrator to be sold, which she supposes to be their full value at that time, as they were then under the incumbrance of her mother's dower estate, and therefore hopes she may be considered as a purchaser, John Hunt having no other estate left for payment of his debts; but, in any event, she may be considered as having a lien in the slaves for the money so paid, with interest. The chancellor decreed the slaves, with their profits, to the appellees, upon payment to them by the appellant of one-half those debts of John Hunt, with which these slaves were chargeable. The defendant appealed.

The doctrine of election seems to have been fully considered by Mr. Powell, in his treatise on devises. Therein he lays down the following principles, on the authority of Lord C. J. Talbot, in the case of *Streatfield v. Streatfield*, Cas. Temp. Talbot, 176: "When a man takes upon him to devise what he has no power over, upon the supposition that his will will be acquiesced under, the court of chancery will compel the devisee to take entirely, but not partially, under it; there being a tacit

condition annexed to all devises of this nature, that the devisee do not disturb the disposition that the devisor has made." To the same effect are the remarks of Lord C. J. DeGrey, in his judgment in *Pulteney v. Lord Darlington*, cited 2 Fonb. 325, note 1: "A man may by a mean, and indirectly, give what is not his own, either by express condition, or equity arising under an implied condition." And to the same effect is *Whistler v. Webster*, 2 Ves. Jr. 371. And that rule equally applies, says Powell, whether the benefit under the will be immediate or consequential; for though the effect in such cases is, that the devise operates as a satisfaction for the previous interest of the devisee, yet the principles by which satisfactions, strictly speaking, are governed, do not apply to cases of this kind, therefore it is not necessary that the thing devised should be of the same nature or of adequate value with the thing in lieu of which it is to be received: Powell on Devises, 450. And Lord Talbot, where the will comprised both real and personal estate, and the land, to which one child was entitled in tail, was thereby given to another, and a personal legacy to the tenant in tail, went so far as to infer an intent that whoever took by that will should comply with the whole, and put the party to an election of the estate tail or the personal legacy: Powell on Devises, who refers to 2 Vern. 14, 617, and Id. 555.

To these rules there are some exceptions, or rather qualifications, as if the devisee be a creditor and not a volunteer, and some others: Powell, 454, 458, 459, 463. But, it is said, no case upon this rule has yet gone so far as to establish the proposition that if a devisor, in his will, takes upon himself to dispose of an estate in which he has no interest, but which is absolutely another's, and in the same will gives a beneficial thing to the owner of such estate, the owner of the estate shall either waive the benefit of the devise, or renounce his estate; the foundation of the rule being a supposed misconception of the testator as to the situation of his own property: Id. 465. And this observation was particularly relied on by the appellant's counsel.

True it is, William Upshaw, by his codicil, gave the appellees what he had no power to bequeath, his wife's interest in the dower slaves held by her mother, being merely a reversionary interest, which, in the event of her surviving her husband, without his disposing thereof in his lifetime, or reducing the slaves into possession, would survive to her. But it is clear, from the words of the codicil, that he thought the slaves were

his own, and that he had a power to bequeath them by his will. This was clearly a misconception of his right in respect to them. For, though he might have sold his wife's reversionary right, it being a vested interest, yet, if he neglected to do so, he could not dispose of it by will, but it would survive to her. The case of *Dade v. Alexander*, 1 Wash. 30, I conceive, does not affect this principle; for the husband's right was, in that case, decided to be absolute, in case he survived the wife; but here she was the survivor.

But in order to put a devisee to the alternative of either waiving his own interest under a will, or foregoing his claim to some interest disposed of therein, to which he is previously entitled, independent of the will, it must be clearly evinced that the devisee's taking both will defeat the general intent of the devisor: Powell on Devises, 466. In the present case, it was manifestly the testator's intention to limit his bounty to his wife to the period of her widowhood, or perhaps her life, after which he bequeathed the estate before given to her, or rather, to use his own words, lent to her, for life, at most, to the children of James Upshaw. Whether he was at that time apprised of the bequest of his wife in John Hunt's will, does not appear; but the codicil manifests an intention to make some provision for his uncle Forest Upshaw's children, the appellees; and he has done it in such a way as to compel the appellant to elect either to forego the use of his property, so long as she continued a widow, or to renounce the benefit of the reversion whenever it should happen. The devise to her being of the use of his whole estate during her life, gives great weight, I think, to this construction. In the case of *Whistler v. Webster*, 2 Ves. Jr. 371; 2 Fonb. 326, note 1, it is held "that a clear knowledge of the funds being requisite to election, no person shall be bound to elect without such previous knowledge." Many other cases may be cited to the same effect; and the rule appears to me to be so reasonable, just and consonant with every principle of equity, that I think it ought to be adopted. In the present case, the compromise between the appellee and the remainder-men may be considered as some evidence of such knowledge; and the nature of the compromise is such, that it would seem that in making it, she had determined her election. Otherwise, I should have inclined to think she could not have been considered as concluded of her election, until the death of Anne Upshaw put it in her power to ascertain the amount and value, both of the property and estate bequeathed to her, and of that

bequeathed from her by her husband's will. But taking all the particular circumstances of the case together, I am of opinion that the decree be affirmed as to this particular point. But I think the chancellor ought to have allowed interest upon the money paid to prevent the sale of the negroes by Hunt's executor. In that respect, I think the decree erroneous; but I concur in the decree which has been agreed to in conference.

ROANE, J., delivered a concurring opinion.

FLEMING, J., concurred.

The opinion of the court was: "That there was no error in so much of the decree of the superior court of chancery as decides that, according to the principles of equity, the appellant cannot retain both the slaves bequeathed to her by the will of her brother, John Hunt, on the decease of his mother, Anne Upshaw, who held the same for her life, in right of dower, the property devised and bequeathed to her by her husband, William Upshaw, by whom those slaves at the death of the said Anne Upshaw were bequeathed to the appellees; and as directs the said slaves, with their progeny, to be delivered to the said appellees, with an account of their service and the profits arising therefrom; and as requires the appellees to recompense the appellant for the moneys paid by her in the discharge of the debts of John Hunt, with the payment of which those slaves were chargeable; but that there is error in the said decree in not allowing to the appellant interest upon the moneys so paid by her. And this court is further of opinion, that a just and reasonable allowance should be made to the said appellant for the support and maintenance of such of the said slaves as are or may have been aged, infirm, children, or otherwise expensive or unprofitable to the holder, as also for such taxes, doctor's bills, and other reasonable expenses paid or incurred by the appellant on account of those slaves, as she shall be able to prove. Therefore, it is decreed and ordered, that so much of the said decree as is contrary to the above opinion, be reversed and annulled, and that the residue thereof be affirmed," etc.

QUARLES'S ADMINISTRATRIX v. LITTLEPAGE.

[2 HENING & MUMFORD, 400.]

ASSUMPSIT OF TESTATOR.—On the trial of an issue upon the *assumpsit* of the testator, evidence is not admissible showing a promise or engagement on behalf of the executor.

ADMISSION OF DEBT.—The mere admission of a debt is not sufficient to charge the defendant with the whole demand of the plaintiff; he must, nevertheless, prove the amount due.

APPEAL from a judgment of the district court. The facts appear from the opinion.

Randolph, for the appellant.

Call, for the respondents.

TUCKER, J. This was an action of *assumpsit* against the administratrix, for goods, etc., sold to the intestate. The plaintiff declared on an *assumpsit* by the testator, and on the trial offered evidence, that the account was presented to the administratrix, and she read it over without objecting to any of the articles; but said some things in the first part of the account she knew nothing of, but did not doubt they were delivered, and that she would pay the balance. This evidence was objected to, but admitted by the court, and verdict and judgment were rendered for the plaintiff.

That the proof ought to correspond with the nature of the charge in the plaintiff's declaration, is one of those maxims which have never been controverted. It has, however, been attempted on the part of the appellees, to show that this maxim does not apply to the present case, by identifying the administratrix with the intestate, and relying on the rule in legal proceedings, that if an executor or administrator be sued for a debt due from his testator, etc., and does not defend the suit, he admits the debt, and judgment may, thereupon, be had against the estate of his testator in his hands. But this rule is not true to the extent which was contended for. If an executor be sued on a bond of his testator, and does not defend the suit, it is very true that judgment shall be rendered for the whole debt appearing to be due by the bond. But, if he be sued upon an account, although the executor, by not defending the suit, admits that there is something due, yet the plaintiff must prove his account, or he shall recover but one penny damages, although there be assets; and it is the same if he pleads *plene administravit*, which admits the debt, but not the amount: 1 Esp.

142; Buller's N. P. 140; 1 Salk. 296. In the present case, the administratrix said there were some of the articles she knew nothing of. If the evidence had been even admissible, how were the jury, from this evidence, to ascertain what articles she knew something of, and what she knew nothing of?

The appellee's counsel relied also on a case noticed in Gilbert's Law of Evidence, 160, where, in *assumpsit*, by an executor for money due his testator in his lifetime, on the plea of the act of limitations, an *assumpsit* to the testator eight years before was proved, and a renewal of the promise to the executor, within six years, was allowed to maintain the issue, though the *assumpsit* in the declaration was laid to the testator only; for it was said the *assumpsit* to the executor, to the representative of the testator, is an *assumpsit* to the testator himself. For which Carthew, 471, is cited. But the contrary was expressly determined by the whole court in *Green v. Crane*, 2 Ld. Raym. 1101; and that case, I find, was recognized as authority by the whole court of K. B., 3 East, 409. The conclusion drawn from the case in Carthew must, therefore, fail. My opinion is that the judgment be reversed, and the verdict set aside; and that the cause be remanded to the district court for a new trial to be had therein, with directions that the evidence excepted to on the former trial be not again admitted.

ROANE, J. This subject was so fully discussed in the case of *Fisher's Executor v. Duncan and Turnbull*, ante 605, that I shall do little more than refer to the decision in that case. The testimony offered and admitted consists of two parts: 1. Of the remarks of the testatrix upon the account, when it was presented to her, and which, it is contended, amount to an admission that the goods were delivered to the intestate; and, 2. Of her declaration thereupon that "she would pay the balance." The admission of this declaration in evidence amounting to an *assumpsit* by the administratrix, when the issue was joined upon the *assumpsit* of the intestate, is justly reprobated in the case of *Fisher's Executor v. Duncan and Turnbull*, and if the other testimony were proper, the opinion of the court is still erroneous, in not withholding the evidence of this promise from the jury. But the other part of that testimony, if it amounts to an admission that any of the goods were delivered to the intestate, is wholly uncertain and incomplete to show what part; at most, it is only equivalent to the case of a writ of inquiry, in which, although the debt is admitted, evidence must be exhibited to ascertain the amount of the damages. The evidence in

this is at least not commensurate with the whole claim, and, therefore, too uncertain and incomplete to be submitted to the jury.

My opinion is that the judgment be reversed.

FLEMING, J. The declaration is on an *assumpsit* of the testator, for goods, wares, and merchandises sold and delivered to him in his lifetime. Plea, that the testator did not assume in his lifetime, and issue thereupon. Had the delivery of the goods been proved, the law would have implied an *assumpsit*, but the evidence to support the issue is that when the account was presented by the witness to the administratrix, she read the account over, and did not object to any item in the account, and said that some things in the first part of the account she knew nothing of, but did not doubt that they were delivered, and that she would pay the balance.

This appears to me to be improper evidence at the trial of an issue on an *assumpsit* charged against the testator only. In *Shelly's case*, 1 Salk. 296, which was an action upon the case against an executor, upon *plene administravit* pleaded, Lord Holt declared that the plaintiff must prove his debt, otherwise he shall recover but one penny damages, though there be assets; for the plea only admits the debt, but not the quantity. So in the present case, admitting that the *assumpsit* of the administratrix might be given in evidence, when an *assumpsit* of the testator only is charged, yet it is at most a qualified *assumpsit*, "that she would pay the balance;" and what that balance was does not appear, which brings it precisely within the reason of *Shelly's case*, above cited.

I am of opinion, therefore, that the judgment be reversed, the verdict set aside, and the cause remanded for a new trial, with an instruction that the evidence stated in the bill of exceptions is not to go to the jury on such trial.

Judgment reversed.

DEW v. THE JUDGES OF THE SWEET SPRINGS.

[3 FLEMING & MUMFORD, 1.]

MANDAMUS, WHO ENTITLED TO.—The writ of *mandamus* is the proper remedy to restore a clerk of a court ousted from his office by the illegal appointment of another person.

PARTIES TO WRIT.—The person occupying the office ought to be made a party to the rule, or to the conditional *mandamus*, or such rule or *mandamus* ought to be served upon him, so as to enable him to defend

his right before the peremptory *mandamus* issues; but if it appear from the record that he was apprised of the proceedings and defended his right, it is sufficient.

PROCEEDINGS ON WRIT.—If the original rule be to show cause why a *mandamus* should not issue to admit the clerk, the subsequent rule, or the *mandamus* founded thereon, may nevertheless be to restore him to the said office; for such rules may be changed and modified so as to conform to the rights of the parties, and promote the justice of the case.

APPEAL from the judgment of the general court, discharging an order to show cause why a *mandamus* should not issue.

The facts fully appear from the opinion.

Wickham and Randolph, for the appellant.

Chapman Johnson and Wirt, for the respondents.

TUCKER, J. Dew, the appellant, obtained a rule from the general court upon the judges of the Sweet Springs district court, to show cause why a *mandamus* should not issue, directing them to admit him to the office of clerk of the said district court; to which a return was made, “that at a court held for the said district, on the eighteenth day of May, 1805, the appellant, Dew, produced in court a commission signed by a majority of the judges of the general court, appointing him clerk of that district court, in the room of Samuel Dew, senior, deceased; also a certificate from the clerk of Botetourt court, of his having taken the oaths prescribed by law. But not offering sufficient security for the faithful performance of the duties of the said office, the court proceeded to appoint Erasmus Stribling to fill the said office, in the room of the said Samuel Dew, who, having taken the oaths as the law directs, together with James Breckenridge and others, entered into bond, etc., with such condition as the law requires. And at a district court continued and held as aforesaid, on the twenty-second day of May, 1805, Samuel Dew again appeared in court, and offered sufficient security for the performance of the duties of the clerk of the said court, of which the court took time to consider; and at a court continued and held as aforesaid, the next day, the said Samuel Dew was refused to be admitted to the said office of clerk, because on the first day of the term, when called upon to execute a bond, he offered insufficient security, although the greater part of that day was allowed him to provide security, and previous to the appointment of Erasmus Stribling, said Dew acknowledged he was unable to find further security on that day; but then alleged that at a future day it was probable he would be able to obtain sufficient security.”

The commission and certificate from the court of Botetourt county, within referred to, are in the following words:

“These are to certify that Samuel Dew is appointed the clerk of the district court to be holden at the Sweet Springs, in the county of Monroe, in the room of S. D., senior, deceased. Given under our hands and seals, this twenty-third of January, A. D. 1805.” Signed with the names of six judges of the general court, with seals annexed.

“At a court held for Botetourt county, February 12, 1805, S. D., gentleman, produced in court an appointment signed, etc., appointing him clerk of the district court holden, etc., whereupon the said S. D. took the oath of fidelity, the oath to support the constitution of the United States, and the oath of the said office. Teste: H. B. CLERK, B. C.

“A copy. Teste: ERASMUS STRIBLING, C. S. D. C.”

To the above copy of the records of the court the judges subjoined, moreover, the following reasons:

“We consider it the duty of the judges to hold a court on the first day of the term, and find that the civil and criminal business of the country required it; that S. Dew was commissioned in the month of January preceding, and had sufficient time to have procured security, without which he well knew he could not act. That circumstanced as the judges were, they could not proceed to elect a clerk *pro tempore*, and they would not have been justified in respecting the declaration of the said S. D., that it was probable he could get security at a future day, considering his failure for several months, and the first day of the court, where a large number of the people of the district were present. We consider, therefore, that the judges of that court acted correctly and properly in the appointment of Erasmus Stribling, who fully answers their expectations and those of the public.” Signed by the judges present, and attested by Erasmus Stribling, C. S. D. C.

As my opinion, in this case, will be founded upon the matters contained in this return, I shall no further notice the remainder of the record and proceedings in the general court than to observe that the above-mentioned rule was, on the thirteenth of November, 1807, discharged. From which order Samuel Dew prayed, and was allowed an appeal to this court.

The first question which I shall consider is, whether the writ of *mandamus* be the proper remedy in this case?

Judge Buller informs us that the writ of *mandamus* is, in

England, a prerogative writ, issuing out of the court of K. B. (as that court has a general superintendency over all inferior jurisdictions and persons), and is the proper remedy to enforce obedience to acts of parliament, and to the king's charters, and in such case is demandable of right: Bull. N. P. 199. Under the term charters are comprehended all grants from the crown, whether of lands, honors, franchises, or aught besides: 2 Bl. Com. 346. Under this description, then, all commissions granted by the crown, whereby any person is authorized to hold and exercise any public office whatever, come under the general head of the king's charters.

To enforce obedience to such a commission, especially if founded upon the authority of an act of parliament, the proper remedy is by writ of *mandamus*, which, in such case, is demandable of right. And it lies to compel the admission or restoration of the party applying to any office or franchise of a public nature, whether spiritual or temporal: 3 Bl. Com. 110. Here the office claimed is founded on an act of the legislature of the commonwealth, and is grantable by a commission, under the hands and seals of a majority of the judges of the general court; and is, moreover, an office of a public nature, and which relates extensively to the administration of justice through a very large portion of the commonwealth. It has, therefore, every character that may be thought necessary to entitle the person holding such a commission, and who hath been either refused admittance into his office, or improperly turned out of it, to the benefit of a writ of *mandamus*.

It has been objected, however, that a *mandamus* will not lie where the party hath another legal and specific remedy; but we are told otherwise by Judge Blackstone, who calls it a high prerogative writ, of a most extensive remedial nature; and that it may be issued in some cases where the injured party hath also another more tedious method of redress; as in the case of admission or restitution to an office: 3 Bl. Com. 110. This is the very case now before us; and although possibly the injured party may have another remedy, I think there is no other so well adapted to the nature of the case as that by *mandamus*.

I shall now proceed to consider whether upon this return made to the first rule to show cause why a *mandamus* should not issue, the general court ought or ought not to have awarded the writ.

The return comprehends the record of the proceedings of the district court on three several days in the same term, in re-

spect to the matter in controversy. The record of the first day states that the appellant produced in court a commission signed by a majority of the judges of the general court appointing him clerk; also, a certificate from the clerk of Botetourt county of his having taken the oaths prescribed by law; but not offering sufficient security, etc., the court proceeded to appoint Erasmus Stribling, etc.

Upon this part of the return, the judges having certified from the record that the appellant produced in court a commission signed by a majority of the judges, but not saying whether the same was under their hands and seals as the law directs, it might have been doubtful to the general court whether the commission was granted in such manner as the act directs; in such a case we are told by Judge Buller that the court will issue a conditional *mandamus*, in order that the right may be tried upon the return: Bull. N. P. 200. If, then, there were no other reason than this one for refusing the writ of *mandamus*, the general court ought to have granted it; and then upon the return the appellant might have traversed that part of the return which describes the commission and averred that it was granted under the hands and seals of the judges, and if upon issue joined it had been so found, he would have been entitled to a peremptory *mandamus*, if there were no other cause for refusing it.

The record of the first day proceeds to state, as I have already noticed, that the appellant also produced in court a certificate from the clerk of Botetourt county, of his having taken the oaths prescribed by law; but, not offering sufficient security for the faithful performance of the duties of the said office, the court proceeded to appoint Erasmus Stribling, etc.

The sufficiency or insufficiency of the security which the appellant offered being a question of fact, upon which the judges of the district court had a right to exercise their discretion, but in which they may nevertheless have been mistaken, the question as to the appellant's right is thereby rendered doubtful; therefore, according to the authority above cited, if there were no other reason for refusing the *mandamus*, the court ought to have granted it, that it might have been tried, upon the return, whether the security offered was, in fact, sufficient or not.

The record of the fourth day states that the appellant again appeared in court, and offered sufficient security, of which the court took time to consider; and the next day the court refused to admit him to the said office of clerk, because on the first day

he offered insufficient security, and acknowledged he was unable to find further security on that day; but alleged that at a future day he should probably be able to obtain sufficient security.

This brings us to the question, so much agitated and discussed, whether the district court were authorized to appoint another clerk in case the clerk appointed by the judges of the general court, either should neglect or be unable to give security, as the law requires, on the first day of the term.

It will readily be admitted that the reasons assigned by the judges in the latter part of their return, are very strong in favor of their opinion respecting the necessity of holding a court, and proceeding upon the business of the district, criminal as well as civil, on the first day of the term. And their reasons for not appointing a clerk *pro tempore* are perhaps strictly legal, and well founded. The question, however, still remains, whether the appellant had not a right to offer sufficient security at any time during the term, and that having in fact offered it on the fourth day of the term, instead of the first, the judges ought or ought not to have received the same, and thereupon to have admitted him to exercise the duties of his office. This question depends upon the act which prescribes the manner in which clerks of the district courts are to be appointed, which declares "that every person appointed clerk of any district court, having taken the oath for giving assurance of fidelity to the commonwealth, and the oath required to be taken by clerks of courts, adapting the same to the district court, shall thenceforth be enabled to execute the duties of his office." The appellant produced to the judges of the district court, on the first day of the term, a certificate that he had strictly complied with this injunction of the law; he had been duly authorized thereby to execute the duties of his office from the twelfth of February to that period. If an officer be created by letters patent (and commissions are letters patent), he is a complete officer before he is sworn, and before any investiture: 5 Bac. Abr., Gwil. ed. 188, tit. "Offices and Officers," letter E.

But the appellant had been sworn, and had been for more than a quarter of a year duly authorized by the express words of the law to execute the duties of his office; he was (if duly appointed, of which hereafter) clerk *de jure* and *de facto*; like a spiritual clerk in holy orders, who, having been duly presented, instituted, and inducted into a rectory, is in full and complete possession, and in legal phrase is called *parson-impar-*

sonce. The duties of his office means all the duties of it, as well in court as out of court; nor can the risk of misconduct for a few days under the immediate eye of the court, bear any comparison with that which may be supposed to arise from a clerk's performing the duties of his office, without being subjected to such an immediate superintendence and inspection, for a quarter or half a year, as the law allows.

The appellant having produced to the court such a certificate as the law directs, the court were bound to enter the same on record. This was all that was necessary to be done at that time; it would thence appear of record, that he was duly commissioned, and had done and performed all that the law required, to enable him to execute the duties of his office; no ceremony of admission or induction was necessary, no additional oath was required to be taken.

But it is objected that he did not, nor could not, give sufficient security for the faithful performance of the duties of his office, on the first day of the term. Let us consult the law, and be guided by the spirit as well as the letter of it.

Every person appointed clerk of a district court, may take the oaths required to be taken, previous to his entering upon the execution of the duties of his office, before any court of record in the commonwealth; after which, or, in the emphatical words of the law, from thenceforth he shall be enabled to execute the duties of his office; a certificate of which qualification shall be entered of record in the district; "wherein, at the first session, he shall, moreover, enter into bond with sufficient security," etc.

It is contended that the words, at the first session, must mean the first day; but I see no reason for that construction, any more than the first hour, or the first minute. The term session, when applied to courts, means the whole term; and in legal construction, the whole term is construed but as one day, and that day is always referred to the first day or commencement of the term; and this construction has been carried so far, that where parties had covenanted to levy a fine at the next term, and one of the parties died after the first day of the term, and the fine was entered at a subsequent day of the same term, this fine was held to be well levied, notwithstanding one of the parties was dead at the time; he being living on the first day of the term, and the whole term considered as one day. It is the same with a judgment in any other case: *Bragner v. Langmead*, 7 T. R. 20. In the present case, such a construction ap-

pears to me to be very reasonable. The securities of a clerk might reside at a distance from the court, and might not attend the first day; the clerk himself might not, from sickness, or other sufficient cause, be able to attend; the court might be dissatisfied with the sufficiency of the security offered, but upon further information be satisfied with it; or the clerk, as in the present case, might, at a future day, be able to offer additional security, to the full satisfaction of the court.

Ought a man to be ousted from his office under such circumstances, although the law had permitted him to exercise it for half a year before, without any other security than his integrity, his oath and his conscience? I have before stated, that the comparative risk of misconduct in the presence and under the immediate inspection and control of the court, was very slight in such a situation. And should he neglect to produce sufficient security before the end of the term, such neglect would undoubtedly be a cause of forfeiture, and he might be immediately proceeded against, and evicted as the constitution and the law direct. The requisition of the law that a clerk is to give bond with sufficient security, for the faithful execution of the duties of his office, is a condition in law, and is to be construed as a limitation; his office would legally terminate with the session: 2 Bl. Com. 155; but not before.

This may be compared to the case of a parson who may neglect, after institution and induction, to read the liturgy and articles of the church, or make the declarations against popery, or take the abjuration oath; or may absent himself sixty days in one year, from his benefice, in certain cases. In all which cases, we are told, the benefice is void: 1 Bl. Com. 493. Still, both the law and the constitution require that he should not be ousted of the office in which he had a freehold, but by due process of law: L. V. ed. 1794, or Rev. Code., vol. 1, c. 15, p. 18; Id. c. 66, sec. 14, p. 75. The judges of the district court, probably, did not consider him as duly invested with his office, until he had given bond and security. Upon that point, I feel myself constrained to differ with them. On this point, then, I am clearly of opinion that the appellant ought to have been admitted to give bond and security at any time during the session.

We now come to one of the principal stumbling-blocks opposed to the emanation of the writ of *mandamus*, by the counsel of the appellees. They tell us, that if a *mandamus* be awarded, Mr. Stribling will be turned out of office, without that due process of law which the constitution and the acts which

I have before referred to, prescribe; and a distinction was taken between a *mandmus* to admit and one to restore a person to an office. The former, it is said, gives only a legal, not an actual possession; though in a *mandamus* to restore, the court will go further; and for this 1 Strange, 538, and 3 Burr. 1267, were cited and relied on.

In the latter case, however, the court granted a *mandamus*, although there was another person actually in office; and although the right claimed, was barely a legal right, but perhaps not, in strictness, a public office. But the question now before us, concerns an important public office, which concerns, or at least is necessary, to the administration of justice. Shall we, then, in such a case, be deterred from pursuing that course which will most effectually advance justice and preserve right? But we are told, Mr. Stribling ought to have been served with notice of this motion, that he might contest the rule. It was properly answered, that the return shows he had notice, being attested by him; and the record shows he did appear in the general court as a party, and consent to the award of a commission to take depositions; what need then of further notice?

But another objection has been insisted upon, that although the general court might have been of opinion that they ought to have granted a writ of *mandamus*, they could not have granted the proper writ in this case, being tied down by the terms of the rule. But can it be seriously supposed, that this objection can prevail in a case which concerns the general administration of justice, over a very large portion of the commonwealth, wherein all due expedition ought to be observed, and where (in my opinion, at least) no other specific or adequate remedy can be found? Can it be seriously contended, I say that, if upon the return of the rule to show cause it should appear that there were circumstances in the case which might render it necessary and proper, in order to fulfill the intentions of the law and to do strict justice between the parties, in some measure to vary the terms of the writ from those of the rule, the judges of the general court were bound rather to discharge the rule, than to accommodate the terms of the writ to the nature of the case, in order to do strict right and justice, and to put an end to a contest, injurious not only to the parties, but to the public in general? I revere the maxim, *est boni judicis ampliare justitiam*; and where the general weal requires it to be done, as far as in me lies, I shall endeavor to conform to it. I think, then, the general court might have awarded the writ, in

terms commanding the judges of the district court to receive bond from the appellant, with the security offered by him on the fourth day, or such other sufficient security as he might offer during the next succeeding term, and thereupon to restore him to his office of clerk, or to show cause to the contrary. Nor can I perceive the smallest inconvenience which such a departure from the words of the rule could have produced, either to the public or to the parties.

Hitherto I have considered this case, as if it had appeared by the return that the appellant had been duly appointed by a majority of the judges of the general court, by commission under their hands and seals, granted by them to supply a vacancy in the office of clerk of the district, which had happened since the last session of that court, by the death of Samuel Dew, Sr., the late clerk, in vacation; all which circumstances, I hold, ought to appear upon the face of the commission, or the same will be void.

Wherever the right of granting and creating new offices is vested in the king, as the head and fountain of justice, he must use proper words for that purpose; as in the erection of a new office, the words *erigimus*, *constitutimus*, etc., must be made use of; and it hath been adjudged, that the word *concessimus* is not sufficient, unless there be an office already in being: 5 Bac. Abr., Gwil. edit. 188, tit. Offices, etc., letter E.

An office being a thing which lies in grant, cannot regularly be granted but by deed, duly executed: 1 Lon. 219, Gawton and Lord Dacres. Where the form of the words of nomination to the office of clerk of the peace by the *custos rotulorum* of the county, were, "I do nominate the said Philip Owen to be clerk of the peace, according to the act of parliament," which was held good, the court of king's bench reversed that judgment, because he did not name any county certainly, of which he should be clerk (although the nomination was in open court), nor distinguish which statute he intends; for there are two statutes which concern this matter: 2 Salk. 467; *Saunders v. Owen*, cited in Bac. Abr. Offices, E.

A commission is a delegation by warrant of an act of parliament, or of the common law, whereby jurisdiction, power, or authority is conferred to others. They are like the king's writs; such are to be allowed which have warrant of law, and continual allowance in courts of justice: 4 Inst. 163; 3 Inst. 656.

In the reign of Edward III, the justices were so careful that no innovation should creep in concerning commissions of oyer

and terminer, that certain justices having their authority by writ, where they ought to have had it by commission, though it were of the form and words that the legal commission ought to be, John Knivit, C. J., by the advice of all the judges, resolved that the said writ was *contra legem*. And whereas, divers indictments were before them found, all that were done by color of that writ were damned: 4 Inst. 164; Bro. Abr. Commissions, 16.

In England, as I have before shown, the king's commissions are by letters patent, under the great seal, and are matter of record, and as such are evidence (or rather, the highest evidence) in themselves. It is the very act which delegates an authority, and therefore ought, upon the face of it, to show everything that is necessary to its validity and perfection; and ought to contain apt words for that purpose; otherwise it may be void for uncertainty; it should, moreover, conform to the directions of the law and constitution of the state.

The constitution, art. 18, directs that commissions and grants shall run in the name of the commonwealth; this paper does not. Whether it were competent to the legislature to authorize any commission whatsoever to be granted in any other manner or form than the constitution prescribes, is not necessary now to be determined; having given no directions concerning the tenor of the commission, it ought, I conceive, to conform to the directions of the constitution.

The judges of the general court, having no power (except by law, to appoint clerks of the district court), their authority ought to appear upon the face of the commission. It ought, moreover, to appear upon the face thereof that they were not only judges of the general court, but a majority of them.

It ought to have appeared that Samuel Dew, Sr., died between term and term, and that the commission was granted to supply the vacancy so happening in vacation; because the law prescribes another mode of appointment if the vacancy happens in term time.

It ought to have contained words of grant or delegation of authority, as "we do appoint," in the first person; thereby manifesting this to be their act of delegation; whereas the paper only certifies that the appellant is appointed, not specifying when or by whom, or by what authority. Any man, who knew the fact, might grant such a certificate, and it would, in my opinion, be just as good evidence in a court of record as this paper.

The nature and tenure of the office ought, moreover, to have

appeared upon the face of the commission, the same being grantable during good behavior; whereas, upon this paper, it might be made a question whether it were such an office, or one during pleasure or otherwise.

The law having in one section, and upon one occasion, authorized an appointment to be made by certificate; see acts of 1788, c. 67, secs. 19, 20, in which this distinction is most obvious and incontestable, and in the very next section having directed that the appointment, in all other cases, and on all future occasions, shall be made by commission, we must believe the legislature both understood and intended a difference between them; and so the judges understood it upon some other occasions.

I think it highly probable that the appellant's ardor and haste in pursuit of his appointment induced him to prepare this instrument for the signature of the judges before he applied to them respectively for an appointment, and that, without examining the law, as they would otherwise undoubtedly have done, they subscribed their names to the instrument so presented. The very high respect and esteem I entertain for the whole of that most worthy and respectable bench, induce me to make this conjecture as to the error into which, I apprehend, they have inadvertently fallen.

Conceiving, therefore, that the paper which is spread upon the record, as the commission which the appellant presented to the district court, is not a commission, as the law requires, I am of opinion that the judgment of the general court, refusing the writ of *mandamus*, ought to be affirmed; the appellant not having shown any legal right to the office he claims.

ROANE, J. I will first inquire whether a *mandamus* is a proper remedy in this case; and second, whether, on the merits, the appellant is entitled to success in his application.

It is agreed on all hands that this writ (which, in England, is considered as a *prerogative writ*), lies to admit or restore to an office which concerns the administration of justice; and that in various other cases, it ought to go on reasons of public policy and convenience. In no case can those reasons apply with more force than in the present, where it is not only important that the rightful officer should enjoy his franchise, but also (in a public point of view) have possession of the records and administer the duties of his office. It is important, too, that the most *speedy* decision should be given on the subject, as is manifest from the course adopted by this court in taking up the cause out of turn; and, as conducive to that end, the most

direct remedy should be pursued, which is consistent with justice and the policy of the laws. It is agreed that a *mandamus* will lie where a party has a legal right, and no other specific remedy, or a specific remedy (as an *assise*) which has become obsolete. This remedy by *assise* is considered in 5 Bacon, 197, as perhaps the only specific remedy in this case; and it will not lie unless the party has had a seisin of his office: *Id.* It was always, therefore, an incompetent remedy in cases where a party requires to be *admitted* to an office to which his title has not been perfected by a seisin. An information in the nature of a *quo warranto*, whether considered as under the statute of Anne, in England, or as at the common law, is not in itself a specific remedy; it only paves the way for the introduction of a specific remedy, by producing a judgment of *ouster* against the person actually in possession of the office. And the principal difference between these two modes of proceeding are, that the common law information does not go without the intervention of the prerogative (in England), whereas, under the statute of Anne, an information may be brought in relation to corporation disputes, without the leave of the court, at the instance of any relator: 3 Bl. Com. 262. And also that the statute of Anne has provided for a speedy hearing: *Id.* On general principles, therefore, it would seem to be more proper (or, rather, less objectionable) to turn over the party to his private and more speedy remedy under the statute, than to the common law information, which he cannot use without the intervention of the prerogative, or the permission of the attorney-general, and the proceedings on which are, perhaps, more dilatory than in the other case.

It seems admitted by the course of the argument in this case, or if not, it is extremely clear, that a *mandamus* will lie to restore, as well as to admit to an office, like the present; but it is contended that, where the office is full, the *mandamus* ought to be preceded by an information to try the right, and produce a judgment of ouster. Let us examine this position. It seems at least questionable whether all the English cases, in which this position has been taken, have not been bottomed upon the statute of Anne, and, therefore, not only had relation to corporation disputes, which alone are embraced by that statute, but would not apply in this country, where we have no similar statute. If the course adopted by those decisions be reasonable, considered in that relation, it does not follow that it is equally so in relation to the common law informations, and to offices in general.

But even in England, under the statute, and in relation to corporation disputes, it is not a universal proposition that the *mandamus* must be preceded by an information, where a person, as officer, is in actual possession; it is said that in cases where his right is doubtful, and "fit to be tried on an information in nature of *quo warranto*," the *mandamus* ought not to go in the first instance; but otherwise where the election is merely colorable, and the office is clearly void. The cases of *The King v. Bankes*, *The King v. Barker*, etc., are cases in which the *mandamus* went in the first instance, although the office was full. But it is said that the authority of these cases is done away by the decision in *The King v. The Mayor of Colchester*, 2 T. R. 260, in which it was said to be a decisive answer to an application for a *mandamus* that there was another remedy by information in the nature of *quo warranto*, by which the title of the persons in possession of the office could be tried as well as on a *mandamus*, and that the consequence of the rule contended for in that case would be that a second person would be admitted to an office already filled by another. The decision in that case does not overrule those just mentioned when we have reference to the correct rule of construction, the general expressions in a decision shall be expounded by relation to the actual circumstances which exist in the cause. In the case of *The King v. Colchester*, as the legality of the votes given at the election was disputed, it was a case of doubt, and "fit to be tried on an information," and therefore, expressly comes within the distinction taken in *The King v. Bankes*, etc. Wherefore, then, shall we overrule that whole series of cases without necessity, and by a side wind? Wherefore shall we say that in all cases, in cases in which there is no doubt, an information is an indispensable prerequisite? As to the consequences just spoken of in *The King v. Colchester*, the existing officer must always be a party to the rule: *Rex v. Bankes*, and *Rex v. Barker*, *supra*; his claim would, therefore, be tried, and consequently complete justice be done; and the peremptory *mandamus* would, in effect, operate as a judgment of ouster. I take it, therefore, that even in England, and in relation to cases within the statute of Anne, the possession of the office by another is no impediment to a *mandamus*, where the title of the applicant is clear; where the title of the incumbent is clearly void; and where no utility can result from a trial on a *quo warranto* information; and *a fortiori*, in this country, where the proceeding by information is not guaranteed to every citizen, but must be pursued, if at all, by permission of the attorney-general, under the common law.

In this case, as I shall presently attempt to show, the title of Dew to his office was complete, and the election of Stribling was clearly void under the law, and the case involves no facts which were necessary to be tried on an information; besides, the right of Stribling, as he must be a party to the *mandamus*, could be as well tried on a *mandamus* as on an information, especially under our act of 1799 (Rev. Code, vol. 1, p. 392) regulating the proceedings in cases of *mandamus*. The effect of a peremptory *mandamus* to restore will be equivalent to that of an actual and previous judgment of ouster; and if there be any irregularity in this mode of proceeding, it is abundantly overpaid by the consideration that the end is much more speedily attained by this remedy than by the intervention, in the first instance, of an information in the nature of *quo warranto*. As to the objection to the form of the rule in this case, it being to admit, whereas I am of opinion it ought to have been to restore, there is nothing in it. Many cases were cited to show, and if there were none, I should readily sanction the power in the court, considered as *res nova*, that rules may be changed and modified so as to square with the rights of parties, and to attain the real justice of the case. As to the proceeding being *ex parte* in relation to Stribling, it appears on the record that he is in reality a party to the rule, has examined witnesses, and, I suppose, employed counsel; but, if this were not the case, he must be made a party to the *mandamus*, when it issues, or rather he must, by its service on him, be apprised of it, and thus enabled to defend his rights; which rights would otherwise perhaps not be barred. It is as desirable to a court of law as to a court of equity, to avoid circuitry, and to come to the substantial justice of the case as soon as may be; and to that end, the courts of law will modify and adapt the course of their proceedings so as to attain the desired purpose. On the merits of this case, I am clearly of opinion, whether considered only on the returns to the rule, or on the whole evidence, that Dew was a complete clerk, admitting the authenticity of his commission and certificate of qualification; that Stribling was appointed wholly without authority; and that all this appearing by a mere reference to a general law on this subject, and the controversy in this case involving no other facts than the existence of the commission and the qualification by taking the oath, the general court was entirely competent to decide on the motion for a *mandamus*, in the first instance, and need not, as a preliminary, have referred the case to any other court or tribunal.

Dew was a complete clerk. He was appointed by a majority of the judges of the general court, in vacation, and had taken the oaths of office as required by law; and thenceforth he was "enabled to execute the duties," i. e., all the duties, of "his office:" Rev. Code, vol. 1, p. 75. The criticisms of the appellant's counsel on this point are entirely satisfactory; and I adopt their construction of the act without repeating the grounds of it. As to inconvenience, there is no great injury or inconvenience resulting to the public or to individual citizens, from indulging the clerk yet a few days longer, to give security, and the words of the act are fully competent to give him the whole term after his appointment, for that purpose. The latitude of the expressions of the act, especially as there may be also inconveniences and hardships under a contrary construction, must preponderate in the case.

As to the objections to the commission in the present case, taken for the first time from the bench, I think there is nothing in them. It is said that the commission is void, as not being pursuant to the constitution; and that it is also a fatal objection that the commission itself does not specify the character of the grantors, and state in precise terms the tenor and extent of the authority granted. As to the first ground of objection, which is more particularly that the commission does not run in the name of the commonwealth, the answer is, that this is only requisite in commissions emanating from the executive authority, and which are to be tested by the governor under the seal of the commonwealth. This provision in the constitution does not necessarily extend to particular trusts or authorities, which, it may be provided by law, shall flow from other sources. In fact, I now have in my hand two commissions of different clerks of district courts, in which this is omitted, though the commissions seem to be, in other respects, full and perfect; and it is presumed that no commission now existing under the district court law would stand the test of this objection. As to the other objection, it is said that the commission in question does not state the grantors were judges of the general court. The answer is, that this is not particularly required by the act; that it is a notorious fact, apparent on almost every page of the district court records, who are the judges of the general court, as the allotments of judges to the several district courts, as made by the judges of the general court are, I believe, recorded in the former; and that this court does take cognizance of and admit that fact in a variety of instances.

We know as well, in this case, that the grantors are judges of the general court, as, for example, in the ordinary case of grants of *supersedeas* by those judges, the award of which never states their quality or character of judges of the general court; and yet, notwithstanding the power of granting writs of *supersedeas* to the judgments of the county courts is given to the judges of the general court only; and objection on account of this omission has never been taken, or, if taken, would be indubitably scouted by this court. It is also objected that this commission should appear to have been granted by a majority of the judges of the general court. The answer is, that it is granted by six judges; and we know, by the general law of the land, that there are only ten judges in that court. Again, it is said that this commission is insufficient, as it only uses the words, "is appointed," and omits the usual technical words, "do hereby constitute and appoint," etc. The answer is, that this is essentially equivalent; and in 3 Bac. Abb. 387, Gwil. edit., the words *dedi et concessi* are said to amount to a grant. Again, it is objected that the commission does not guarantee the office during good behavior; the answer is, that the clerk, when appointed, has this tenure by paramount authority; by the terms of the act itself, which have expressly sanctioned this tenure. But what has considerable weight with me, in relation to the sufficiency of this commission, arises out of the original act of 1788, on this subject. By that act, a certificate of appointment by the majority of the judges, accompanied by a qualification by taking the oath of office, completely constituted the original clerks; and the act further providing for the case of a non-attendance by the judges on the day appointed for this purpose, or for vacancies thereafter happening, directs that in those cases a majority of the judges shall appoint by commission under their hands and seals. Now, it would seem reasonable, as there is no good reason why there should be more particularity in the one case than in the other, that the "commission" here intended should receive its character, except in relation to the seal, which is expressly required by the act, from the "certificate" prescribed in relation to the original clerks, and that as much generality should be tolerated in the one case as in the other. But I go upon this still broader ground, that I am unwilling to defeat or overthrow the rights of our citizens, when substantially conferred and granted, upon mere technical objections; upon objections so extremely nice and subtle, that they have never occurred to, or been taken by, any of the opposing counsel, in either of the courts in which

this case has been so copiously and ably discussed. In this case, the office of clerk is granted by those who are known to us *ex officio*, to have competent authority; and the general law upon the subject comes in aid of any expressions, otherwise too general, and defines the tenure and extent of the authority in question.

From the foregoing considerations, it appears that no vacancy of Mr. Dew's office had happened at all, and consequently none occurred during the session of the district court, without which the judges of the district court had no power to appoint another. Mr. Stribling, therefore, clearly appears to us, admitting the existence and legality of the commission and certificate before mentioned, to have no manner of title to the office.

With respect to the merits of this case, as disclosed by the testimony, I am of opinion, that the district court erred in their construction of the law on the day in which Stribling was appointed. The court would neither suffer Dew to act as clerk without giving security; allow him a reasonable time to obtain personal security to the amount required; and any man might be placed in his situation by the failure of his friends to attend on the first day of the court; nor admit sureties whose landed estate was amply sufficient. I am of opinion that landed property ought to have been taken into the account. I ground this opinion on the established doctrine as to justifying bail. In 8 Bl. Com. 291, it is held, that those justifying as bail must swear, that they "are worth" the full sum, after their debts are paid. By analogy to this case, and seeing no ground for excluding the real estate, I think the district court erred in confining their inquiries to the personal estate only. I am also of opinion, that Dew ought to have been permitted to act as clerk without giving security, his failing to do which, however, during the whole of the term, would probably have subjected him to the loss of his office.

In every view, therefore, which I have been able to take of this case, I am of opinion that the judgment of the general court is erroneous; and that a *mandamus* ought to go to restore Dew to his office, of which he was completely invested by the commission and certificate of qualification; to be served also on Stribling, who will thereby have an opportunity to defend his possession and his title, and possibly to vary the case as it now appears to us. It is only upon the present aspect of the case, as disclosed by the testimony, that the opinion now pronounced has been founded.

FLEMING. J., delivered a concurring opinion.

Taken in connection with the case of *Runkle v. Winemiller* (1 Am. Dec. 411), this case will be instructive. It is very clearly stated there what the nature of a prerogative writ is, which the writ of *mandamus* is styled. In *Booker v. Young*, 12 Gratt. 306, Daniel, J., thus refers to the principal case: "The proceeding by way of *mandamus* seems to me to be a fair, convenient and ready mode of litigating and deciding upon questions such as those presented by the record of this case. The propriety of resorting to it in cases of the like kind, is, I think, fully sanctioned in *Smith v. Dyer*, 1 Call, 562, and in *Dew v. The Judges of the Sweet Springs*. I am not aware that the authority of these precedents has been questioned in any subsequent decision of this court; and they furnish, in my opinion, a satisfactory answer to the objections made here to the remedy selected by the petitioner."

TABB v. ARCHER.

[3 HENING & MURFORD, 393.]

NATURE OF MARRIAGE ARTICLES.—Marriage articles are to be taken only as the heads or minutes of an agreement entered into between the parties, upon a valuable consideration, and being in their nature executory, ought to be construed and moulded, in equity, according to the intention of the parties.

INTEREST OF ISSUE IN SUCH ARTICLES.—Children of the marriage are considered as purchasers by virtue of marriage articles; and after marriage, their rights cannot be affected by either of the parties to the articles; a court of equity will interfere in the behalf of those for whose benefit the articles were made.

CONSTRUCTION OF MARRIAGE ARTICLES.—The intention of the parties in marriage articles should be collected from the nature of the agreement, the language and context, the usage in such cases, and the legal rights of the parties, as they existed before, and would have existed after the marriage if no agreement had been made; parol evidence cannot be resorted to, unless there be some latent ambiguity, or unless there is some omission through fraud or accident.

RIGHTS UNDER MARRIAGE ARTICLES.—The husband should not be deprived of any of his legal rights, except such as he must be understood and intended to have given up; and the same construction ought to be made in relation to the wife's legal rights, either accruing on the marriage, or existing antecedent thereto, and independent of it.

CONSTRUCTION OF PARTICULAR AGREEMENT.—It having been agreed by marriage articles that all the estate, real and personal, of the wife should remain in her right and possession during the marriage, and the profits only to go to the support of the husband and wife, and issue, if any; and further, that the husband would never sell or dispose of any part of the estate, but that it should always be held as an inviolable fund, for their support and that of their issue, the first clause was construed as containing a declaration of the uses of the estate during the coverture only and the second as declaring the uses afterwards. The husband, therefore, as well as the wife, was held entitled to the benefit of these uses for life.

APPEAL from a decree of the chancellor dismissing complainants' bill. The facts appear from the opinion.

Call, for the appellants.

Hay, Wickham, and Randolph, for the respondents.

TUCKER, J. This is an appeal from a decree of the Richmond chancery court, dismissing the bill of the appellants, who are, first, the issue of the marriage between the defendants, Archer and wife, formerly Miss Tabb; the mother of that lady, and her brothers and sisters, or a part of them, praying that the estate of the defendant, Mrs. Archer, may be settled pursuant to certain marriage articles entered into between herself and husband previous to their marriage, under which the appellants claim an interest as purchasers, and for general relief.

The articles executed under the hand and seal of the parties, both of full age at the time, in contemplation of their intended marriage, having been proved by three witnesses, and admitted to record in the county court of Amelia, where the parties, or one of them, resided, no question can be made as to that fact. But as a great deal was said in the argument as to an undue influence exercised by Mrs. Tabb over her daughter, to prevail on her not to marry Dr. Archer, unless he consented to execute such articles, I shall only observe that Mrs. Tabb's conduct, from the evidence, not only seems to me to stand above every possible imputation of impropriety, but to have been highly laudable and proper, and such as every prudent and affectionate parent, whether father or mother, would have done well to have pursued in such a case. Mrs. Tabb was guardian of her daughter by nature, and as such, the marriage of her daughter belonged to her, unless a testamentary guardian had been appointed by the father, or the guardianship of the daughter had been duly committed to some other guardian: *Eyre v. Countess of Scarborough*, 2 P. Wms. 117. But it appears from the record that she was actually her daughter's guardian, whether by appointment by the father or the court, does not appear, and is perfectly immaterial. She was, therefore, in the strict line of her duty when she was endeavoring to secure to her daughter and her children the fortune committed to her care. That she refused her consent to the marriage after her daughter came of age, is perfectly immaterial; it could not impede or prevent the marriage, and the only penalty which it is alleged she proposed for disobedience (though that is not proved, or rather is disproved), was that her daughter should not be married at her

house, or that she would not speak to her again. Even if these things were proved, I hold them of no consequence. A mother has a right to withhold her consent to any connection with her daughter which she does not approve of; and, whatever reasons or arguments she might use, if there were no improper motives or inducements held out on her part, they are not impeachable here. With respect to Dr. Archer, whatever were his motives for first objecting to, and then consenting to and executing the articles, there can be no doubt of his free agency, unless this court should agree to set a precedent, for which I can find none, in any other place. The validity of the articles, therefore, I conceive, cannot be impeached; the indorsement by Dr. Archer puts this matter out of all doubt as to him, being made after the marriage. That indorsement could not, however, operate anything as to Mrs. Archer, who was no longer *sui juris*.

Articles made in consideration of, and previous to, marriage, are considered as heads of agreement entered into between the parties for a valuable consideration; a provision for the issue of the marriage is one of the great and immediate objects of this agreement; and consequently a principal intention of such agreement must be to secure such a settlement as shall contain an effectual provision for that issue; which end it is clear cannot be answered by a settlement so framed as to leave it in the power of the parents to bar their issue by fine and recovery, or any other conveyance whatsoever. And the reason is, that the children of the marriage are considered as purchasers: *Trevor v. Trevor*, 1 Eq. Cases, 390; 1 P. Wms. 633, S. C.; 1 Fearne, 78, 79; 1 Fonb. 202, 203, n. (p.); 2 Powell on Contracts, 27; *Harvey v. Ashley*, 3 Atk. 610, 611. And therefore in articles on a marriage, to settle lands to A. for life, remainder to the heirs male of his body, by his wife, the articles being executory, and but as minutes, it has been decreed that the settlement should be made according to the intention, and consequently to the first son, etc. And the reason given, is, that if this construction upon marriage articles were not made, it would give way to fraud, and overreaching, and to the defeating of the manifest intention of the parties in settlements in which the issue of the marriage are considered as purchasers: 1 P. Wms. 633, 634; 3 Atk. 611. And marriage agreements are said to differ from all others in this, that the principal consideration is the marriage. Settlements are prudential acts done chiefly for this consideration; and the estate settled may be greater or less,

according to the discretion of the parties; as soon as the marriage is had, the principal contract is executed, and cannot be set aside or rescinded; the estate and capacities of the parties are altered; the children born of the marriage are equally purchasers, under both father and mother, and therefore it has been truly said that marriage contracts ought not to be rescinded, because it would affect the interest of third persons, the issue.

It seems also agreed, that there is this further difference between agreements on marriage being carried into execution, and other agreements, that all agreements besides are considered as entire, and if either of the parties fail in performance of the agreement in part, it cannot be decreed against the other in specie, but must be left to an action at law; but in marriage agreements, it is otherwise; for though either the relations of the husband or wife, should fail in performance of their part, yet the children may compel a performance, they being considered as purchasers and entitled to all benefit of the uses under the settlement, notwithstanding there has been a failure on one side: 3 Atk. 187, 610, 611. And, although the rights of an infant, party to such an agreement, to real estate, may not, perhaps, be bound by any agreement in relation to it, unless there be issue of the marriage (as there has been in this case), yet, as to personals, her interest may be found by agreement on the marriage; and if the parent or guardian cannot contract for the infant, so as to bind that property, the husband as to the personal estate, would be entitled to the absolute property in it, immediately on the marriage: 3 Atk. 613. And Lord Ch. Hardwicke said, he knew of no precedent where a marriage agreement had been called in question, where it had been made (as in that case) with consent of parents and guardians; an observation which I make to save a repetition of what I have here said, in the cause which was heard at the same time with this. The force, obligation, and effect of marriage articles is thus described by the lord chancellor in the case of *Randal v. Willis*, 5 Ves. Jr. 273: "The marriage taking place upon these articles, and no other written document of the agreement between them, and the articles formally executed under seal, whatever the rights of the parties are by the articles, it is totally impossible that any parties thereto could be discharged from any one obligation imposed by the articles." Settlements varying from the articles have therefore been reformed or set aside: *Legg v. Golwine*, Cas. Temp. Talbot, 20; *West v. Erissey*,

2 P. Wms. 349; *Randal v. Willis*, 5 Ves. Jr. 273-76. And articles being in their nature executory, ought to be construed and moulded in equity, according to the intention of the parties: *Trevor v. Trevor*, 1 P. Wms. 631; *Kentish v. Newman*, 1 P. Wms. 234; *Osgood v. Strode*, 2 Id. 257; *Griffith v. Buckle*, 2 Vernon, 13; *Shelburne v. Inchiquin*, 1 Bro. Ch. 338. And in the case of agreements in consideration of marriage, a court of equity will totally disregard the form if the substance of the agreement and intention of the parties in making it can be got at; as in *Cannel v. Buckle*, 2 P. Wms. 244; Id. 41; *Trevor v. Trevor*, 1 P. Wms. 622; 1 Eq. Cas. Abr. 387, S. C.; *Bale v. Coleman*, 1 P. Wms. 142; *Seal v. Seal*, Id. 290; *Griffith v. Buckley*, 2 Vern. 13; *Osgood v. Strode*, 2 P. Wms. 257; *Jones v. Laughton*, 1 Eq. Cas. 392; *Burton v. Hastings*, Id. 393, where a woman gave a bond in two hundred pounds penalty to her intended husband, in which the intended marriage was recited, and the condition was, that if it took effect, she would convey all her lands to her husband and his heirs; and though it was objected that this bond became void on the intermarriage, the lord chancellor said it is sufficient that the bond is a written evidence of the agreement of the parties, and being upon a valuable consideration (the marriage), it shall be executed in equity; and that it would be unreasonable that the intermarriage upon which alone the bond was to take effect, should itself be a destruction of the bond. And the same point was before decided, in the case of *Acton v. Acton*, Prec. in Chancery; 237; 2 Vern. 480, S. C.; 1 Eq. Ca. 63.

The intent of the parties to an agreement may be evinced, either from the nature of the covenant compared with the substance of the agreement, or from the nature of the contract on which the covenant or agreement arises, considering who are the parties to it, and the object of their stipulating: Powell on Cont. 40. "The most apt instances of this sort that occur, are in the cases of marriage articles, wherein, although lands are expressly covenanted to be conveyed to one for life, with remainder to his heirs male of his body, which, on a contract executed, would give to the party an estate tail; yet, on a bill brought for the execution of articles, the lands will be directed to be settled upon it for life, with remainder in strict settlement upon his first, and other sons in tail male, etc., because, from the nature of the contract, it is clear that the issue of the marriage are principally in the consideration of the parties, and that the contract is made with a view to secure to them the

estates stipulated about, and of which they are purchasers in consideration of the marriage. It is considered, therefore, that it would be a strange and vain construction of such contracts, if the principal contracting, and who is evidently the person meant to be restrained thereby, should be intended to have such an estate by them as would enable him, the very next day after their execution, to defeat, by a fine, the limitations to his issue, with a view to secure which limitations the contract was entered into, and a valuable consideration paid for it."

Nor are the issue of the intended marriage the only persons to whom the consideration of the marriage extends. In the case of *Jenkins v. Remys*, 1 Lev. 150; Id. 237, it was held that the marriage and marriage portion of the first wife, for whose issue by the intended marriage a provision was expressly made by a settlement, with remainder to the heirs of the body of the husband, did extend to the issue of the husband by a second wife. So in the case of *Newstead and others v. Searles and others*, 1 Atk. 265, a widow on her marriage, with the participation and consent of her intended husband, made a settlement of her own estate, in favor of the issue of her former marriage, in fee, with a proviso that, if there should be any issue of her intended marriage, they should have an equal share of her estate. There was no issue of the second marriage; and Lord Hardwicke declares that the issue of the first marriage stood in the very same plight and condition as against a mortgagee having notice of this settlement, as the issue of the second marriage, if there had been any, would have done. So, in *Goring v. Nash and others*, 3 Atk. 186, marriage articles were entered into between a father and his son, on the son's marriage, wherein, after several limitations, there was a limitation in favor of one of the daughters of the father (not the eldest), whereupon it was objected that she was a mere volunteer, as not being the issue of the intended marriage, but only a daughter of the father. Lord Hardwicke said, all the decrees for the specific performance of marriage articles, on limitations to younger children, were authorities in favor of the daughter of the father; and where such articles have been decreed at all, they have been carried into execution even as to collaterals, and not carried into execution in part only. "Suppose," said he, "in the present case a bill had been brought by R. F. Jr. (the son), or the widow, must not this particular limitation have been decreed to the plaintiff (the daughter of the father), at the same time?" And he said nearly the same thing in the case of *Newstead v. Searles*, 1 Atk.

268. In the case of *Vernon v. Vernon*, which was a bill for the specific performance of marriage articles, whereby lands of a certain value were agreed to be settled on the husband and wife, and the issue male of the marriage; remainder to the brothers of the husband, who were the plaintiffs, in which it was objected that the articles as to them were merely voluntary, and not within any of the considerations therein expressed, yet the lord chancellor decreed in their favor, and upon an appeal to the house of lords, that decree was affirmed: 2 P. Wms. 594. The case of *Lechmere v. Carlisle*, 3 P. Wms. 211, was, where a bill was brought by the nephew and heir of Lord Lechmere, deceased, to compel a specific performance of marriage articles, whereby a certain sum of money was agreed to be laid out in lands, to be settled to the use of Lord Lechmere for life, without waste, with divers limitations over, remainder to Lord Lechmere in fee.

The defendants, by their answer, insisted that Lord Lechmere intended only a provision for the lady and the issue of the marriage; and that the limitation of the remainder in fee to the right heirs of Lord Lechmere ought not to be carried into execution in his nephew's favor, the articles as to him being merely voluntary. Sir Joseph Jekyll, master of the rolls, after taking a full view of all the various cases upon the subject, decreed in favor of the nephew; and his decree was, upon that point, affirmed by Lord Ch. Talbot: 3 P. Wms. 228; Cas. Temp. Talbot, 80. And the lord chancellor, in delivering his opinion in that case, observed, that "it was then a settled point, that where the securities are appropriated, money agreed to be laid out as land shall go as land, not only to the issue of the marriage, but likewise to a collateral heir, or general remainderman, unless there appears some variation in the parties' intent." *A fortiori* the land itself. For, as was said by Lord Ch. Macclesfield, in *Edwards v. The Countess of Warwick*, 2 P. Wms. 175, the objection that the plaintiff claimed under a voluntary limitation, did not hold, inasmuch as it had been held, that the consideration for the precedent limitations in a marriage settlement had been applied even to the subsequent ones; as where, in consideration of a marriage and portion, land had been settled on the husband for life, and then to the wife for life, remainder to the children, with remainder to a brother; these considerations have extended to the brother, as was in fact afterwards done in the case of *Vernon v. Vernon*, before mentioned; so that if that case required the support of a precedent,

one might probably have been found. And this is agreeable to what Lord Hale is reported to have said in the case of *Jenkins v. Keamish*, Hardres, 395, that the consideration of the marriage, and the marriage portion, will run through all the estates raised by the settlement, though the marriage be not concerned in them, so as to make them good against purchasers, and to avoid a voluntary conveyance, cited 2 P. Wms. 252; and though Lord Macclesfield, in the case of *Osgood v. Strode*, 2 P. Wms. 255, said, "the marriage and marriage portion supported only the limitation to the husband and wife, and their issue, which was all that could be presumed to have been stipulated for by the wife or her friends;" yet, it must be observed, that in that case, neither the wife, nor her issue, nor any of her friends were parties; but the contest was between a nephew, in whose favor there was a limitation in the articles, and the heirs at law of the father and son, by whom these articles were entered into on the son's marriage; and there was a decree in favor of the nephew, against the heirs at law. And the settlement was directed to be moulded in such manner as provide for all the branches of the father's family (from whom the estate settled moved), according to the apparent intention of the father: 2 P. Wms. 257, 258.

In the case of *Le Neve v. Le Neve*, as taken from Mr. Forrester's M. S., 3 Crui. Digest, 363; 3 Atk. 646, S. C., where, by marriage articles, the issue of that marriage were to have the estate in such manner as Edward Le Neve, the father, should by deed or will appoint; and no direction how the estate should go for want of appointment; but only, in default of issue, to Edward and his heirs; so that, if the plaintiff should die without issue in their father's life, their representatives would be entitled to nothing. Lord Hale said, notwithstanding this, he thought the plaintiffs entitled to some relief, as the other part of that contingency might happen, and decreed a conveyance accordingly. This has satisfied the doubt in my mind, whether the collateral relations and mother of Mrs. Archer were entitled to ask for a settlement pursuant to the articles.

And where it appears by the marriage articles, that in the settlement proposed to be made, the parties to the marriage are to take an estate for life, instead of an estate tail, a fine levied by the husband (who was absolute owner of the premises in fee-simple, at the time of the marriage and entering into the articles, but was to have been tenant for life only, with remainder to the issue male of the marriage, and the heirs male of such

issue male, lawfully begotten, with remainder to his own right heirs) was considered as no bar to the eldest son of the marriage, although the uses of the fine were declared to be for the second and other sons of that marriage, and although the eldest son, as heir to his father, inherited other very large estates: *Trevor v. Trevor*, 1 P. Wms. 622.

Length of time also appears to be no bar. In the last mentioned case, near fifty years had elapsed from the date of the articles, and upwards of twenty-five years from the date of the fine. It appeared that the articles had been thrown by for several years as useless, being found in the bottom of an old trunk after Sir John Trevor's death. But Lord Chancellor Parker disregarded these circumstances, saying that if, within two years (the time mentioned in the articles within which Sir John Trevor agreed to make the proposed settlement) the wife's trustees had called for the settlement, or had brought a bill to compel the performance of the marriage articles, there would be no question that the court would have decided the settlement upon Sir John Trevor for life, etc., according to the intention of the parties: 1 P. Wms. 622; 1 Eq. Cas. 387. The same doctrine as that last mentioned was held by the master of the rolls, in *Lechmere v. Lord Carlisle*, 3 P. Wms. 213, 214, viz.: that Lord Lechmere was compelled in equity to fulfill the articles, and having lived after the year within which time the lands were to have been purchased and settled, without doing it, he had broken his covenant; and the trustees might thereupon have brought their bill immediately to compel him to make such purchase and settlement. And although in common cases of a breach of covenant, the parties may be left to their action at law for damages, yet the power of a court of equity to carry marriage articles into execution, notwithstanding a breach on either side, seems not to be doubted, for the specific execution of articles, being the most adequate justice in general, shall not be left to an action at law: Per Lord Ch. Hardwicke, *Goring v. Nash*, 3 Atk. 187; *Harvey v. Ashley*, Id. 611, same doctrine.

Marriage articles being in their nature executory only, it has been determined that a covenant therein contained to stand and be seised of the premises until such time as a further assurance should be thereof made to the uses of the said articles, could not be taken as a final settlement: 1 P. Wms. 632.

This view of the principles by which courts of equity are governed, in respect to marriage articles, may furnish us with a guide to the decision of the case before us.

The marriage articles to which Dr. Archer and his present wife are the only parties, recite "that, whereas a marriage is intended to be shortly had and solemnized between the parties thereto, and they have mutually agreed that all the estate, both real and personal, to which the said Frances is entitled, shall be secured to and settled upon her and her heirs, except as hereinafter excepted. Now, in consideration of the said intended marriage, and for the intent and purpose aforesaid, the said J. doth thereby covenant and agree to and with the said Frances, that all the aforesaid estate, both real and personal, consisting of sundry plantations, slaves, stocks of horses, cattle, etc., except as therein excepted, shall remain in the right and possession of the said Frances, during the continuance of the said intended marriage; and the annual proceeds thereof, only, shall be applied to the support and maintenance of the said J. and F. and their issue, if any there should be. Secondly: The said John doth thereby further covenant and agree to and with the said Frances, that he never will sell or dispose of any part of the said real or personal estate (except as before excepted), in any manner whatsoever. But the same shall always be held as an inviolable fund for the support and maintenance of the said John and Frances and their issue, if any there should be of the said intended marriage, applying only proceeds or profits, without renting or applying any of the original stock for that purpose. But the whole of the said original stock, except as therein excepted, shall be inviolably held, for the use and benefit of the said Frances and her heirs, in the same manner as if the said intended marriage should never take effect. By which expression it is meant and understood between the parties, that if the said John should depart this life, leaving issue of the said marriage, and the said Frances should again intermarry and leave issue, such issue shall be equally entitled to the benefit of this settlement as the issue of the said intended marriage would be; and in the event of the death of the said Frances without issue, then the whole of the aforesaid estate, both real and personal, except as before excepted, shall go to her next legal representatives." On the back there is an indorsement, of which I shall take notice presently.

It was objected to this instrument, that, if it were anything, it was a marriage settlement, and not merely articles; that it was therefore an agreement already executed between the parties, and not merely executory, as articles are; that being already

executed, it must be left to its legal operation and construction; that the court could not interfere to direct any other settlement, since that would, in effect, be to change the agreement between the parties. To these objections, an answer perfectly satisfactory was given by the counsel for the appellants; that there is no covenant or grant, or any words capable of passing an interest, or of declaring that she will stand seised to the uses in the instrument mentioned, or of creating a use or trust on the part of Mrs. Archer. The covenants are entirely on the part of the husband; and whether the object of these covenants be executory or not, yet, as it appears that the husband has actually broken his covenant by executing a voluntary conveyance for the land, and taking a conveyance to himself, in exclusion of the wife and her issue, to provide for whom, whether of that or any future marriage, was manifestly the object and intention of the articles, that objection ought not to prevail. And the case of *Lechmere v. Carlisle*, 3 P. Wms. 211, is a strong authority to show that, whenever there is a breach of any covenant contained in marriage articles, a court of equity will interpose its aid to enforce a settlement to be made pursuant to the intention of the parties as it may appear from the articles; provided the application for the aid of the court be made in behalf of such persons whose interest, whether immediate or remote, was within the consideration of the marriage, as in the case of the issue of Doctor Archer and his wife, now before us, who, in my opinion, are well entitled to have such a settlement made as was manifestly the intent and meaning of the parties, as expressed in, or as may be collected from, the articles themselves.

The counsel for both parties have contended, on their respective parts, for an exposition and interpretation of the articles, by evidence *dehors* the articles themselves. The counsel for the appellants rely on Mr. Giles's deposition, and some other evidence, altogether parol; their adversaries claim the benefit of the indorsement made by Dr. Archer and his lady, upon the articles, sometime after the marriage. I am of opinion that both ought to be rejected in the present case. The only effect of that indorsement, I conceive, is to prove, if such proof were wanting, that there was no fraud or surprise upon Dr. Archer, in the original execution of these articles. With respect to Mrs. Archer, they could have no effect; she was no longer *sui juris*; no longer capable of contracting with, or of explaining a contract made with, her husband; being equally incapable of

being a witness for or against her husband, as of contracting with him. The indorsement, to have any operation with regard to her, must operate in one or other of these modes. With respect to parol testimony, I can discover no such ambiguity in these articles as to require or permit a resort to it. I have, on a former occasion, expressed my reasons pretty much at large for rejecting parol testimony to explain the meaning and intention of parties in a solemn covenant, or even in written agreements: *Long v. Colston*, 1 Hen. & Munf. 121. I will not repeat them, though I still feel their full force, and conceiving that the articles themselves are sufficiently intelligible, as containing words which have, in themselves, a positive, precise sense, I have no idea of its being possible to change them; and shall add, upon the authority of Lord Thurlow, that I take it to be an established rule, that words cannot be changed in that manner: 1 Bro. Ch. R. 350, 351; 4 Id. 244, 245.

But the various cases upon the subject of marriage articles, I think one general rule may be collected, which I do not recollect to have found precisely laid down in any one. It is this: That whenever, in marriage articles, a settlement is proposed to be made, if there be any *casus omissus*, or chasm, in the uses or estate intended to be settled, such *casus omissus*, or chasm, shall be supplied by the court according to the intention of the parties, if possible to be collected from the instrument; if not, then from the rules of law, or the usages customary in such settlements. Thus, where the uses expressed in the articles have gone no further than to limit an estate tail to the issue of the owner of the estate, it was held that the equitable reversion in fee descended upon the heirs general of the grantor; and it would seem that a settlement was directed accordingly: *Goring v. Nash*, 8 Atk. 186. So where money, part of which was the husband's and part the wife's, was on the marriage agreed to be laid out in land and settled on the husband for life, remainder to the wife for life, remainder to the heirs of their bodies, and the uses went no further, it was decreed that the heir of the husband should have the whole, notwithstanding the wife survived him, after the wife's death, upon the presumption that it was so intended: *Knight v. Atkins*, 2 Vern. 20, 21. And this decree was cited and approved by the master of the rolls, in *Lechmere v. Carlisle*, 8 P. Wms. 217, 218. So, where articles on a marriage were to settle lands to A. for life, remainder to the heirs male of his body by his wife, the articles being executory, and but as minutes, the settlement should be

according to the intention and usual course in such cases, and, consequently, to the first son, etc., in strict settlement: *Trevor v. Trevor*, 1 P. Wms. 633.

Now, the husband, upon the marriage, is a purchaser for a valuable consideration, and shall not be deprived of any of his legal rights accruing upon the marriage, except such as he shall have expressly covenanted or consented to give up by the articles concluded between him and his intended wife. In decreeing a settlement, therefore, to be made pursuant to these articles, the court ought to inquire how far he has given his consent to this deprivation; beyond which this court cannot go. Therefore, if there be in the articles any contingency unprovided for, in the happening of which his legal rights, *jure mariti*, may take place without prejudice to the general scope and intention of the articles, and to the interests of those who are within the consideration of them, the settlement to be made, in case of such contingency happening, ought, I conceive, to pursue the rules of law, so as to let him into the perception and enjoyment of those legal rights. And the same construction ought to be made in favor of the wife's rights accruing on the marriage; each party retaining in their fullest extent their respective rights accruing upon the marriage, which they have not, on a fair and liberal interpretation of the articles, according to the established rules of construing them in courts of equity, surrendered for the mutual benefit of themselves, and their issue, or of such other persons as are evidently within the consideration of the agreement. I wish to be understood as confirming my observations to the construction of marriage articles, not as meaning to extend them to settlements, or any other agreements executed.

The articles contain two distinct covenants. The first relates exclusively to the continuance of the marriage, during which period the rents and profits only are to be applied to the support and maintenance of the husband and wife, and their issue, if any. By the second, Dr. Archer covenants that he never will sell any part of the estate, except as in the articles mentioned, thereby divesting himself completely of all power of disposing of the same, as in violation of the covenant he has done; but that the same shall always be held as an inviolable fund for the support and maintenance of the said John and Frances, and their issue, if any; only applying the proceeds or profits thereof, without resorting to or applying the original stock, etc. Now, the first covenant applying to the continu-

ance of the marriage; this part of the articles may fairly be interpreted to relate to some future period, so far as relates to the application of the proceeds or profits of the estate; the support and maintenance of the husband is evidently contemplated therein, as well as that of the wife and their issue; and the original fund is to be held inviolably for all those purposes. The provision for the husband is not limited to the continuance of the marriage, any more than the provision for the wife or the children; it must, therefore, be for life at least; subject, however, to the claims of the issue for a proper support and maintenance, if it should be withheld. The meaning, then, is that Dr. Archer, in consideration of the marriage, and of the property left at his disposal by the articles, renounces his matrimonial rights to the rest of the estate of his intended wife; and in lieu thereof covenants and agrees to accept of the proceeds and profits thereof, only for the support and maintenance of himself and family during the continuance of the marriage, and for the like support and maintenance of himself and the issue of that marriage, in the event of his surviving his wife.

But if I am mistaken in the construction of the second covenant, and it should be that it relates only to a support and maintenance for Dr. Archer, during the continuance of the marriage, then, I must observe, that there is no provision made for the event of Dr. Archer's surviving his wife, and, therefore, as there is issue of the marriage, Dr. Archer will at all events be entitled to the tenant by the curtesy of the lands, there being no covenant or agreement to surrender that legal right. But, under the fairest construction of the articles, I think he has agreed to accept the profits for life, of the whole estate, in lieu of the chance, only, of being a tenant by curtesy in the real estate.

The latter part of the second covenant, "that the original stock shall be inviolably held for the use and benefit of the said Frances and her heirs, in the same manner as if the said intended marriage should never take effect," may seem to give room for a different interpretation of the preceding member of the covenant, were it not that the meaning of that expression is immediately explained so as to leave ample room for the construction I conceive it ought to have; or if not, to leave room for the interpretation of the tenancy by the curtesy in the lands, which is nowhere covenanted to be surrendered, or given up, although it may be merged in the life-estate, which, according to my interpretation of the articles, Dr. Archer is entitled to.

My opinion, therefore, is, that the chancellor's decree dismissing the bill of the plaintiffs ought to be reversed; that the defendants, Dr. Archer and his lady, ought to be decreed to execute a settlement of her estate, except as excepted in the articles, to trustees to be named by the court, in fee-simple, in trust to permit Dr. Archer, during the continuance of the marriage, to take and receive the rents, issues and profits thereof, for the support and maintenance of himself, his wife and their issue, if any, and from and after the determination of the marriage union, to permit the survivor of the said John and Frances to take and receive the rents and profits, in like manner, during his or her life, for the like purposes; and from and after the death of the survivor, to hold the same to the use of the issue of the said Frances, and the descendants of such issue, if any there be, in equal portions, *per stirpes*, and not *per capita*; and in case of the death of the said Frances, without issue of her body, and without any descendants, then, and in that case, to the use of the heirs of the said Frances, who shall be then living, generally, in such portions as the law directs; subject, nevertheless, to the right of Dr. Archer to take and secure the rents, issues and profits thereof, in case he shall survive his wife; that the several deeds and conveyances executed by Dr. Archer and wife, for the lands and slaves, etc., and the several deeds and conveyances executed by the persons to whom those deeds and conveyances first mentioned were made, be brought into the court of chancery and there canceled; and that the court of chancery take said further order, as to the records made of the proof of the said deeds and the recording thereof in the district court of Petersburg and in the county court of —, as in the opinion of the court will best answer the purposes of preventing fraud and imposition in consequence of the proving and recording those deeds.

ROANE, J., delivered a concurring opinion.

FLEMING, J., concurred.

The authority of this case was recognized in *Healey v. Rowan*, 5 Gratt. 421-5; *Edison v. Fontaine*, 9 Id. 293; *Findley v. Findley*, 11 Id. 438.

CASES
IN THE
CONFERENCE AND THE SUPREME COURT
OF
NORTH CAROLINA.*

TRUSTEES OF THE UNIVERSITY v. FOY.

[1 MURPHY, 58.]

STATUTE DIVESTING PROPERTY FROM CORPORATION UNCONSTITUTIONAL.

By the constitution it was provided that the legislature should establish schools, and "all useful learning shall be duly encouraged in one or more universities." Accordingly, the legislature established a university granting to it certain property escheated to the state; but an act was afterwards passed divesting such property. It was held such act was unconstitutional.

EJECTMENT to recover the possession of certain escheated lands. The defendants pleaded in bar an act entitled "An act to repeal so much of the several laws now in force in this state as grants power to the trustees of the university of North Carolina to seize and possess for the use of the said university any escheated or confiscated property." To this plea the plaintiff demurred, and the defendants having joined in demurrer, the case was presented for the opinion of the judges of this court. In 1789, the legislature granted to the trustees "all the property that has heretofore, or shall hereafter, escheat to the state." By an act of 1794 it granted to the trustees the confiscated property then unsold; and subsequently the act was passed which the defendants set forth in their plea. The principal question presented was as to the constitutionality of this last act.

Haywood, for plaintiff.

Duffey and Jocelyn, for defendants.

*For the institution of the court of conference and supreme court, see note, 2 Am. Dec. 627. After 1805, the court of conference was styled the supreme court.

By Court.* **LOOKER, J.**, after stating the various acts, and examining the title thereby conferred on the trustees, proceeded: The operation of this act is next to be considered, and it may be necessary to premise that the people of North Carolina, when assembled in convention, were desirous of having some rights secured to them beyond the control of the legislature, and these they have expressed in the bill of rights and the constitution. The preamble to the constitution states, among other things, that "we, the representatives of the freemen of North Carolina, chosen and assembled in Congress for the express purpose of framing a constitution under the authority of the people most conducive to their happiness and welfare, do declare," etc. Section 13 directs the general assembly to elect several officers of state. Section 15 directs the election of a governor. Section 38 directs that there shall be a sheriff, coroner or coroners, and constables in each county. It became necessary for the legislature to appoint these officers, or to pass such laws as would secure to the people such officers as would carry this form of government into effect. The framers of this instrument appear to have been well acquainted with the importance and necessity of education, and lest this object might escape the attention of the legislature, or be by them neglected, section 41 declares: "That a school or schools shall be established by the legislature, for the convenient instruction of youth, with such salaries to the masters paid by the public as may enable them to instruct at low prices; and all useful learning shall be encouraged and promoted in one or more universities." By this section as strong an injunction was imposed on the legislature to establish a university as by the preceding clauses to appoint the several officers of government. These objects seem to be regarded by the framers of the constitution with equal solicitude; they have, therefore, in the same imperative style, declared that there shall be a university; and that there shall be a governor, leaving to the legislature to make such appropriations and create such funds for the endowment of the institution as would be sufficient to effect the purpose for which it should be established. In the year 1789, the legislature obeyed this constitutional injunction, and made an appropriation of escheated lands, and appointed trustees for the management of the concerns of the institution. By the act of 1800, the legislature declared that this property should be taken from the trustees and revert to the state. Is, then, this

*The court was composed at the present time of **MACAY, TAYLOR, HALL and LOOKER, JJ.**

last act authorized by the constitution, or does it destroy a right which that instrument gave to the people, a right highly esteemed in all civilized nations, that of educating their youth at a moderate expense? a right of acquiring knowledge and good morals, which have always been deemed most conducive to the happiness and prosperity of a people?

Some light will be thrown upon this subject, by examining the nature of corporations, how property can be taken from them, and how they can be dissolved. Corporations are formed for the advancement of religion, learning, commerce, or other beneficial purposes. They are either aggregate or sole, and created by grant or by law. When they are once created, they acquire many rights, powers, capacities, and some incapacities: 1 Bl. Com. 495; as, 1. To have perpetual succession; and therefore, all aggregate corporations have necessarily the power of electing members in the room of those who die, to sue and be sued, and to do all other acts as natural persons; 2. To purchase lands, and to hold them for the benefit of themselves and successors; 3. To have a common seal; 4. To make by-laws for the better government of their corporation. These corporations cannot commit crimes, although their members may, in their individual capacity. The duties of those bodies consist in acting up to the design for which they were instituted.

Let us next inquire, how their corporate property can be taken from them, and how they may be dissolved. A member may be disfranchised or lose his place, by his own improper conduct, or he may resign. A corporation may be dissolved by act of parliament, which is boundless in its operation; by the natural death of all its members, in case of an aggregate corporation; by surrender of its franchises into the hand of the king, which is a kind of suicide; by forfeiture of its charter through negligence or abuse of its franchises, in which case the law judges the body politic to have broken the condition on which it was incorporated, and therefore the incorporation to be void; and the regular course is to bring an information in the nature of a *quo warranto*, to inquire by what authority the members now exercise their corporate power, having forfeited it by such and such proceedings: 1 Bl. Com. 485; 3 Id. 263. None of these pre-requisites have been done in the present case. We are then led to inquire into the soundness of an argument greatly relied on by defendant's counsel, that those who create can destroy. The legislature have not pretended to dissolve the corporation, but to deprive them of part of the funds that were

deemed to be vested in them, and to transfer those funds to the state. In England, the king's consent to the creation of any corporation, is absolutely necessary, either given expressly by charter, or by act of parliament, where his assent is a necessary ingredient or implied by prescription: 1 Bl. Com. 472, 473. The king may grant to a subject, the power of creating a corporation, and yet it is the king that creates, the subject is but the instrument: Id. 474. Where there is an endowment of lands, the law distinguishes, and makes two species of foundation: The first, *fundatio incipiens*, or the corporation; in which sense the king is founder of all colleges and hospitals; the other, *fundatio proficiens*, or the dotation of it, in which sense the first gift of the revenues is the foundation, and he who gives, is the founder: 1 Bl. Com. 431.

The constitution directed the general assembly to establish this institution and endow it; then it would seem, from the principle upon which all this doctrine is predicated, that the constitution and not the legislature, had created this corporation; the legislature being only the agent or instrument, whose acts are valid and binding, when they do not contravene any of the provisions of the constitution. We view this corporation as standing on higher grounds than any other aggregate corporation; it is not only protected by the common law, but sanctioned by the constitution. It cannot be considered that the legislature would have complied with the constitutional requisition, by establishing a school for a month, or any determinate number of years, and then abolishing the institution; because the people evidently intended this university to be as permanent as the government itself. It would not be competent for the legislature to declare that there should be no public school in the state, because such an act would directly oppose that important clause in the constitution before mentioned. But if the legislature can deprive the university of the appropriated and vested funds, they can do that which will produce the same consequences; for deprive the institution of funds already vested, and refuse to make any additional appropriations, there never can exist in the state a public school or schools; and thus the legislature may indirectly effect that purpose, which, if expressed in the words before mentioned, they could not do. Besides, when the legislature have established a university, appointed trustees, and vested them with property which they were to hold in trust for the benefit of the institution, have they not discharged their duty as the agents of the

people, and transferred property which is afterwards beyond their control? From that moment the trustees became, in some measure, the agents of the people, clothed with the power of disposing of, and applying the property thus vested to the uses intended by the people, but over which the power of the legislature ceased with the discharge of the constitutional injunction; unless it might be necessary in the course of time, to make other or further appropriations to continue and support the institution; and this we consider to be their duty at all times, when such necessity shall exist, that the expectation of the people, as expressed in the constitution, may not be disappointed.

But one great and important reason which influences us in deciding this question is the tenth section of the bill of rights, which declares "that no freeman ought to be taken, imprisoned or disseised of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the law of the land." It has been yielded on the part of the defendant that if the legislature had vested an individual with the property in question, this section of the bill of rights would restrain them from depriving him of such right; but it is denied that this section has any operation on corporations whose members are mere naked trustees, and have no interest in the donation, and especially on a corporation erected for a public purpose. It is also insisted that the term "law of the land" does not impose any restrictions on the legislature, who are capable of making the law of the land, and was only intended to prevent abuses in the other branches of the government. That this clause was intended to secure to corporations as well as to individuals the rights therein enumerated seems clear from the use of the word "liberties," which peculiarly signifies those privileges and rights which corporations have by virtue of the instruments which incorporate them, and is certainly used in this clause in contradistinction to the word "liberty," which refers to the personal liberty of the citizen. We, therefore, infer that by this clause the legislature are as much restrained from affecting the property of corporations, as they are that of a private individual, unless the expression "law of the land" should receive the construction contended for on the part of the defendant. It is evident the framers of the constitution intended the provision as a restraint upon some branch of the government, either the executive, legislative or judicial. To suppose it applicable to the executive would be absurd, on account of the limited

powers conferred on that officer; and from the subjects enumerated in that clause, no danger could be apprehended from the executive department, that being intrusted with the exercise of no powers by which the principles thereby intended to be secured could be affected. To apply it to the judiciary would, if possible, be still more idle if the legislature can make the "law of the land;" for the judiciary are only to expound and enforce the law, and have no discretionary powers enabling them to judge of the propriety or impropriety of laws. They are bound, whether agreeable to their ideas of justice or not, to carry into effect the acts of the legislature as far as they are binding, or do not contravene the constitution.

If, then, this clause is applicable to the legislature alone, and was intended as a restraint on their acts (and to presume otherwise is to render the article a dead letter), let us next inquire what will be the operation which this clause will or ought to have on the present question. It seems to us to warrant a belief that members of a corporation as well as individuals shall not be so deprived of their liberties or property, unless by a trial by jury in a court of justice, according to the known and established rules of decision derived from the common law, and such acts of the legislature as are consistent with the constitution; and although the trustees are a corporation established for public purposes, yet their property is as completely beyond the control of the legislature as the property of individuals, or that of any other corporation established for merely private purposes. In every institution of that kind, the ground of establishment is some public good or purpose intended to be promoted; but in many, the members thereof have a private interest coupled with the public object. In this case, the trustees have no private interest beyond the general good; yet we conceive that circumstance will not make the property of the trustees subject to the arbitrary will of the legislature. The property vested in the trustees must remain for the uses intended for the university, until the judiciary of the country, in the usual and common form, pronounce them guilty of such acts as will, in law, amount to a forfeiture of their rights or a dissolution of their body. The demurrer must, therefore, be allowed, and the plea in bar overruled.

HALL, J., dissented.

This case is instructive when taken in connection with *Wales v. Stetson*, ante, 39.

THOMPSON v. TATE.

[1 MURPHY, 97.]

WARRANTY ON SALE.—A vendor who affirms his goods to have a certain quality which they do not possess, and when such quality would increase their value, is liable to an action, although he did not know the affirmation to be false.

RULE for a new trial because of misdirection by the presiding judge. The question of law arising on the trial was whether the vendor of personal property, who affirmed at the time of the sale that the property sold had a particular quality, which, if it possessed, would increase its value, is liable in an action on an express or implied warranty, although he did not know such affirmation to be false. Upon the trial, the jury were instructed that the vendor was liable.

By COURT. Upon this question there can be no doubt; the vendor is clearly liable, and the rule for a new trial must be discharged.

For cases on warranty, see *Rutter v. Blake*, ante, 550; *Selmas v. Woods*, and note (2 Am. Dec. 215); and *Bailey v. Nickols*, 1 Id. 83.

WILCOX v. MORRIS.

[1 MURPHY, 116.]

REDEMPTION, RIGHT OF.—A creditor agreed with the debtor to levy an execution on the whole of the debtor's property, and to purchase it in at the sale, and hold it as a security for the debt; it was held equity would give a right to redeem as against the creditor, but not as against purchasers for a valuable consideration without notice of this trust.

WHAT CONSIDERED A MORTGAGE.—No particular words or form of conveyance are necessary to give the contract the qualities of a mortgage. It may be laid down as a general rule, subject to few exceptions, that wherever a conveyance or assignment of an estate is originally intended as a security for money, whether this intention appear from the deed itself, or any other instrument, it is always considered, in equity, as a mortgage.

BILL for redemption. Wilcox, deceased, being indebted to Morris, confessed judgment for the amount of the debt, upon Morris agreeing that he would levy execution on all his property, purchase it in at the sale, and hold it as a security for the payment of the debt; and that Morris should reconvey the property when the debt was paid. Morris, through an agent,

purchased the property, and sold a great part to purchasers for a valuable consideration, without notice of this trust. Wilcox filed his bill against Morris, his agent and the purchasers, to redeem; also, to have an account of the profits and the amount of sales, charging that the whole debt had been paid. On hearing of the cause, three questions were reserved and sent to this court: 1. Whether the contract between Wilcox and Morris was in the nature of a mortgage, and the property sold under the execution redeemable; 2. Whether an account stated and liquidated between Wilcox and Morris ought not to be set aside on account of an imposition alleged to have been practiced on the latter in said settlement, owing to his old age and imbecility of mind; 3. Whether the bill ought not to be dismissed as to the agent and the other purchasers, because the first was a new agent, and received money and conducted business for Morris, and because the latter were purchasers without notice, for a valuable consideration, without notice of the trust.

LOCKE, J., delivered the opinion of the court. The contract between Wilcox and Morris was in the nature of a mortgage, and the property sold under the execution is redeemable. No particular words or form of conveyance are necessary to give to the contract the qualities of a mortgage. It may be laid down as a general rule, subject to few exceptions, that wherever a conveyance or an assignment of an estate is originally intended as a security for money, whether this intention appear from the deed itself or any other instrument, it is always considered in equity as a mortgage and the estate redeemable, even though there be an express agreement of the parties that it shall not be redeemable, or that the right of redemption shall be confined to a particular time, or to a particular description of persons. A court of equity, in applying this rule to particular cases, will often ascertain the fact whether the conveyance was intended as a security for money, however absolute it may appear; and will lay hold of all the circumstances of the transaction to ascertain this fact; such as the value of the estate conveyed and the sum given therefor, the bargainee not being let into the immediate possession of the estate, his accounting for the rents and profits to the bargainor, etc. In the present case, there was a special agreement in writing that the complainant should be at liberty to redeem the property when the debt was paid. We are also of opinion that the account referred to ought not to be set aside, there being no evidence of any fraud or imposition practiced on

Morris. The suggestion of his old age and imbecility of mind is not sufficient to set the account aside; but leave is given to surcharge and falsify the same.

As to the third point, we think the bill ought to be dismissed as to the sub-purchasers without notice of the trust; but as to the representatives of McClain, the agent, the bill ought to be retained, that an account may be taken out of the money which he received, great part of which, complainant alleges, was never by him accounted for to his principal. Let this account be taken, and the bill as to sub-purchasers, without notice of the trust, be dismissed with costs.

See *Belton v. Avery* (1 Am. Dec. 70); *Washburn v. Merrill*, 2 Id. 59.

LANIER v. AULD.

[1 MURPHY, 138.]

WARRANTY IMPLIED ON SALE.—An express warranty excludes an implied one. In the contract of sale the law implies no warranty as to the quality of the goods sold, although it may imply a warranty of title where the vendor has possession at the time of sale.

ASSUMPSIT. Auld sold a negro to Lanier for one hundred and sixty pounds, and at the time executed the following: "This is to certify that I have sold a negro man by the name of Jim for the sum of one hundred and sixty pounds. in hand paid by Isaac Lanier; and I doth warrant the aforesaid slave Jim to be sound and healthy, not over twenty-five years of age. Given under my hand, July 12, 1796. JOHN AULD."

The negro was delivered to Lanier, and Auld shortly after dying intestate, letters of administration were issued. The negro at the time of the sale, and long before, was free. Lanier brought an action of *assumpsit* against the administrator, and declared upon a warranty that the said negro Jim was a slave; and the question arose, now referred to this court, whether the foregoing writing contained a warranty that the negro was a slave, and, if not, whether the law implied such warranty in the case?

By COURT. The plaintiff has declared first upon an express warranty, and secondly upon an implied warranty. The writing signed by Auld contains no warranty that the negro Jim is a slave; it contains a warranty that he is sound, and also that he is not over twenty-five years of age, but is silent as to other quali-

ties. It is true that the word slave is used, but it is evident that this word is merely descriptive of the person to whom the warranty of soundness, etc., was to be applied.

As to the second question, we are of opinion that the law will not imply what is not expressed where there is a formal contract: *Evans's Essays*, 32; 1 *Fonbl.* 364; *Doug.* 654; 6 *T. R.* 606. The express warranty as to soundness and age, excludes any implied warranty as to other qualities. The contract of sale implies no warranty as to the quality of the goods sold, although it may imply a warranty of title when the vendor is in possession at the time of the sale. The plaintiff, however, is not without remedy, and he having applied to the court for leave to amend his declaration by adding a count for money had and received, we are of opinion that such leave should be granted to him upon such terms as the court below shall direct.

See a similar case in New York, *Defreese v. Trumper*, ante, 329.

GAY v. HUNT.

[1 *MURPHY*, 141.]

PAROL EVIDENCE SHOWING TRUST IN DEED. — A person being subject to intoxication, and therefore fearing imposition, conveyed his property by an absolute deed to another, for the benefit of his child, a minor; but no declaration to this effect appeared in the deed. Parol evidence is admissible to prove the trust.

BILL in equity for reconveyance and injunction was filed by Sherwood Gay, an infant, by his next friend, against Charity Hunt, which charged that his father, Elias Gay, being seised in fee of a tract of land, and being a man much addicted to intoxication, and on that account often liable to imposition, and fearing that in some unguarded moment some person might obtain from him a conveyance of his land, and desirous to secure the same so that complainant might have the benefit thereof, agreed with one Brinkley to convey the same to him in fee, the latter agreeing to hold the land in trust for the benefit of complainant, and to reconvey the same when requested. In pursuance of this agreement, the land was conveyed to Brinkley, who gave no valuable consideration therefor. Brinkley has since died, having made his last will and testament, and therein devised the said land to complainant and the defendant, Charity Hunt, as tenants in common. Notwith-

standing the conveyance to Brinkley, complainant's friends and agents had continually kept possession of the land, and defendant well knew that Brinkley held the land as a trustee, but had lately filed a bill for partition. An injunction and a reconveyance were prayed for.

The defendant answered denying knowledge of the facts charged; that she had been informed and believed that Brinkley purchased the land from Gay for a full consideration, and that the said purchase was made, and the deed executed without any trust, and subject to no condition whatever. The answer admitted that the mother of complainant and also of defendant had kept possession of the land, but alleged that this possession had been permitted from motives of affection for a parent.

Various depositions were taken, which proved the agreement and trust stated in the bill; and the cause coming on to be heard, the question was made and sent to this court whether, as the deed to Brinkley purported to be absolute and for a valuable consideration, and the agreement and trust charged in the bill were expressly denied by the answer, parol evidence could be admitted to prove the agreement and trust?

By COURT. The conveyance to Brinkley was not made with any fraudulent intent, or from any motive of moral turpitude. This case is therefore free from the common objections to relief in cases of secret trusts. Whether parol evidence will be admitted to set up a trust, where a deed is absolute, depends much upon the particular circumstances of each case in which it is attempted. In the present case, the court are of opinion that the parol evidence should be admitted, as Brinkley did not take possession of the premises conveyed to him, nor call upon those in possession for an account of the rents and profits; and this "being contrary to the ordinary effect of a sale, gives an impression of a trust of some kind between the parties, and admits the introduction of evidence to explain that trust." 1 Wash. 14 (*Ross v. Norvell*, 1 Am. Dec. 422).

STATE v. STREET.

[1 MURPHY, 156.] .

STYLE OF COURT IN CASE OF PERJURY.—In an indictment for perjury, the style of the court before which the perjury is alleged to have been committed must be correctly set out.

INDICTMENT for perjury, which charged "that at a certain superior court begun and holden," etc., "before the Honorable Francis Locke, Esq., judge of the said court," etc., the defendant, being a witness for the state, "did take his corporal oath upon the holy gospel of God, before the said Francis Locke, Esq., judge as aforesaid, to speak the truth, the whole truth, and nothing but the truth, touching and concerning the matter in question in the said prosecution and issue aforesaid (the said Francis Locke, Esq., then and there having sufficient and complete power and authority to administer an oath to the said Joseph Street in that behalf)." The defendant was convicted, and Duffey, his counsel, filed the following reason in arrest of judgment: "That the style of the court, or of the judge presiding therein, when the perjury was alleged to have been committed, is not duly or legally set forth; nor any jurisdiction shown to administer such oath as is alleged to have been taken falsely and corruptly." The case was then submitted to this court for the opinion of the judges.

By COURT. The indictment should set forth the legal style of the court before which the perjury is alleged to have been committed. The judiciary act of 1777, establishing the county and superior courts, gives the style of each: "courts of pleas and quarter sessions," and "superior courts of law." The indictment in the present case charges the perjury to have been committed before "a certain superior court begun and holden for the district of Hillsborough." As the style of the court is not legally set forth, the indictment is defective, and the judgment must be arrested.

STROTHER v. CATHEY.

[1 MURPHY, 162.]

IMPEACHMENT OF GRANT FROM STATE.—At law, parol evidence is admissible showing that the officers of the state have issued a grant for lands forbidden by law to be entered and granted, and that such grant is therefore void. But where a grant has irregularly issued, the party wishing to avoid it must have recourse to a court of equity.

INDIAN TITLE, NATURE OF.—The title of the Indians to lands is regarded by the European and American governments as a mere possessory right.

EJECTMENT for certain land lying within the bounds of lands allotted to the Cherokee Indians. Strother claimed under a grant from the state in 1803, upon entry made in 1791; the defendant under a grant from the state in 1787.

The first question was, whether evidence was admissible to show that the grant under which defendant claimed was void; and next as to the nature of the title of the Cherokee Indians.

The opinion more fully states the facts in the case.

LOCKE, J. To determine the questions arising in this case, it is necessary to consider the titles under which each party claims the land in dispute. The legislature of the state, in the year 1783, passed an act declaring "that all the lands comprehended within a line described in the fifth section of said act, shall be, and are hereby reserved unto the Cherokee Indians and their nation forever;" and in the sixth section of said act, further declaring "that no person shall enter and survey any lands within the bounds set apart for the Cherokee Indians, under the penalty of fifty pounds; and all such entries and grants thereupon (if any such should be made) shall be utterly void." The defendant claims title to the land under a grant issued by the state of North Carolina, to John Carson, bearing date on the eighth day of December, 1787, whilst the above recited act was in full force, and before any treaty was made with the Cherokee Indians, by which they surrendered or relinquished any of the rights reserved to them by the act of 1783. It has been determined by this court, in the case of *Strother v. Avery*, that a grant obtained under circumstances like the present is utterly void, and can convey no title to the grantee upon the grounds: First, because the words of the act are imperative, and declare the grant to be utterly void; and, secondly, because the officers of state were not authorized to issue grants for lands of this description; the state having, by the act of 1783, divested itself of all title to the same. But it is contended that, although the grant be void, yet a court of law will not receive parol evidence on a trial in ejectment to show the grant void, but recourse must be had to a court of equity, or to the mode of proceeding prescribed by the act of 1798, ch. 7, establishing the court of patents. This court entertains the opinion that it has always been competent for a court of law to receive parol evidence of the location of each tract of land described in a grant, and that, in many cases, it is only by such kind of testimony a grantee can show the situation of the land mentioned in the plaintiff's declaration, or in the defendant's grant; and whenever it is shown that the land claimed by the defendant is situate within the bounds allotted to the Indian nation, then the grant becomes *ipso facto* void; it requires no act to be done, no ceremony to be performed, to

avoid it; but it is, of itself, a mere nullity. Besides, it is competent for a court of law at all times to receive parol evidence to show that the officers of state, who have signed and attested the grant, were not authorized or empowered to issue a grant for lands of a particular description; for if they exceed the authority delegated to them by law, their acts have no force or validity; and would it not be absurd to say, that a grant issued by an individual not known as an officer of the government, and clothed with no authority, could not be declared void in a court of law, but that recourse must be had to a court of equity? Grants of this description differ essentially from those where the officers had the power and authority by law to issue the grant, but which grant may have been obtained irregularly and without conforming to the requisites prescribed by the act of 1777, which irregularity and want of conformity might render the grant voidable by the person injured thereby. Upon this difference the courts of law have, heretofore, founded their decisions. In the first class of cases, they have received parol evidence, and declared the grants void: *The Trustees of the University v. Johnson*, 1 Haywood, 376. But in the second class of cases, where the grant has been irregularly issued, they have said that the party wishing to avoid it must apply to a court of equity; that it would be productive of the most dangerous consequences to avoid it by parol testimony: *Reynolds v. Flinn*, 1 Haywood, 107. The present case falls within the description of the first class of cases, and it is sufficient to say that, in this case, and between these parties, and on a title like the defendant's, a court of law will receive parol evidence, and declare such a grant void, without deciding the general question, or any other than the one submitted.

Having declared the power of the court, upon a trial at law, to receive evidence to show the defendant's grant to be void, we are next to determine how far the title of the lessor of the plaintiff will enable him to recover. He claims title under a grant from the state of North Carolina, having date the nineteenth day of May, 1803, and founded on an entry made in the year 1791. To ascertain the validity of this grant, it may be necessary to take into view some proceedings of the general government as well as of the legislature of this state relative to the lands allotted to the Cherokee Indians by the act of 1783. The first and most important is the treaty made by William Blount with the Cherokee Indians, on the second day of July, 1791, William Blount then being governor of the territory of

the United States south of the river Ohio, and superintendent of Indian affairs for the southern district. By the fourth article of this treaty, it is declared "that the chiefs and warriors of the Cherokee nation, for themselves and the whole Cherokee nation, their heirs and descendants, for a consideration therein expressed, release, quitclaim, relinquish and cede all the land to the right of the line therein described." And within the bounds thus ceded is the tract of land in question. In the year 1791, the legislature of North Carolina passed an act declaring "that a part of Rutherford and Burke counties should form a separate and distinct county by the name of Buncombe," and particularly describes the boundary lines of said county, which lines include the land covered by the plaintiff's grant. It is further declared by the said act "that the justices of Buncombe shall have the same powers and jurisdiction as the justices of the peace have in any other county in this state." By the provisions of the act of 1777, Iredell, 292, it is made "the duty of the justices of the peace of each county to elect an entry-taker, who shall receive entries for any lands lying in such county, which have not been granted by the crown of Great Britain or the lords proprietors of Carolina or any of them, in fee, before the fourth day of July, 1776, or which accrued or shall accrue to the state by treaty or conquest." Under these provisions the lessor of the plaintiff, after the county of Buncombe was formed, and the Indian claim extinguished by Blount's treaty, entered with the entry-taker of Buncombe county the land in question, and on the nineteenth of May, 1803, obtained a grant for the same. The validity of this grant is now to be decided, for the plaintiff in this action must recover by the strength of his own title, and not through the weakness of his adversary's. To the title thus adduced, two objections are made by the defendant's counsel: 1. That the act of 1783 remains unrepealed, and in full force, and that the sixth section of that act attaches to this grant with the same force as to the grant set up by defendant; and, 2. That by the treaty these lands were ceded to the general government, and not to the state of North Carolina. As to the first objection, the answer is that although the act of 1783 has not been expressly repealed by the legislature, yet it is effectually and substantially repealed by the treaty. The act of 1783 was evidently made to preserve peace with that tribe of Indians, who, by the extension of frontier settlements, had become near neighbors to the inhabitants of the western part of Burke county, which peace would probably be broken, and the

advantages contemplated by the legislature in this donation entirely frustrated, if any individual was suffered to interfere with the rights secured to the tribe by the act of 1783. But when that tribe of Indians voluntarily, and for a valuable consideration surrendered up their claim, no injury could ensue to the Indians by entering those lands; for whether they were occupied or remained vacant, was to the Indians a matter of indifference, from the moment of the ratification of the treaty. The reason and policy of the prohibition contained in the act of 1783 ceased, and with it the prohibition itself.

The second objection seems to me to be equally unfounded. These lands having once belonged to the state of North Carolina, and having been granted by that state to the use of the Indian Nation, revested in the state when that use expired, and the Indians release all claim to the same. No expression is used in the treaty to convey these lands to the general government; and although the Indian title was extinguished by the general government, it does not follow that the title rests in them, for since the adoption of the federal constitution, the power of making treaties is surrendered by each state to the general government, and through them alone Indian claims are to be extinguished; and these lands lying within the boundary of this state, acknowledged by the federal government when received into the Union, must remain the lands of this state, until she cedes them away; judgment must, therefore, be entered for the plaintiff.

STONE, J., concurred.

Judgment for the plaintiff.

See *White v. Jones* (2 Am. Dec. 564), and note thereto, where this subject is discussed; and see *Lattimer v. Potet*, 14 Peters, 14, where the principal case is cited as to Indian titles. See *Witherington v. McDonald*, ante, 603.

MAPLES v. MEDLIN.

[1 MURPHY, 219.]

NOTICE OF TRUST TO PURCHASER.—To make the purchaser of a legal title a trustee, it is not necessary that he should have notice as to the particular *cestui que trust*; it is sufficient if he has notice that the person from whom he buys, is but a naked trustee; he is then bound to inquire and find out the *cestui que trust*.

BILL for conveyance of certain land for which Marmaduke

Maples obtained a grant in 1792, and in November of that year conveyed to Thomas Maples, the complainant. On the third of March, 1793, the defendant and one Ray and McNeil obtained judgments before a justice of the peace, against Marmaduke Maples, but no execution was levied until 1795. In 1794, Joel Medlin, one of the defendants, purchased the land for seventeen pounds, and sold it to another of the defendants, Curry; who, on the tenth August, 1794, obtained a deed from Marmaduke and Thomas Maples jointly. In 1795, executions under the above judgments were levied on the land, as belonging to Marmaduke Maples, whereupon Curry resold to Medlin for the consideration of forty pounds. The executions were returned, and thereunder the land was sold in August, 1795, when Ray became the purchaser for thirty shillings. In the fall of 1795, Medlin sold the land to Thomas Maples for about thirty-five pounds, when Maples rented to Medlin for a year; and in the fall of 1796, the latter paid Maples the rent for one year. In the fall of 1797, Medlin continuing in possession, refused to pay the rent to complainant, who ordered him to quit. On the thirteenth February, 1797, Curry, to whom, as before stated, the Maples had conveyed, made a conveyance of the land to the defendant Ray, for the consideration of fifty shillings, informing Ray, previous to the conveyance, that he had resold to Medlin; whereupon this bill was filed by Thomas Maples, to have Ray convey to him; and the case came before this court for the opinion of the judges. Other facts are stated in the opinion of the court.

By Court, LOCKE, J. From the statement of facts made to this court, it is evident the legal estate in the lands in dispute, passed from Marmaduke Maples to one of the defendants, John Curry, and that the equitable title afterwards vested in the complainant, Thomas Maples, under Medlin's purchase from Curry, and complainant's purchase from Medlin; unless it should appear that the first conveyance from Marmaduke to Thomas Maples was made with intent to defraud creditors, and therefore, as to them, be entirely void. It is true that at the time this deed was executed, Marmaduke was indebted to Ray, one of the defendants, and also to one McNeil, for their attendance as witnesses; and it is equally true, that he was also indebted to his brother Thomas, seven pounds, which the latter paid for him as prison fees; and it is proved by witnesses present at the time, that they understood this conveyance rather in the light of a mortgage, than as a conveyance of the absolute

estate, in which light we are rather inclined to view this deed; for it is ascertained that Curry paid ten pounds, part of the purchase-money, to Marmaduke, and the other seven pounds to Thomas, when the latter assured Curry he had then no claims on the land. Curry, however, to be sure of his title, took a conveyance from Marmaduke and Thomas both. Hence it plainly appears, that this deed was made upon a valuable consideration, and nothing appears to show that it was made *mala fide*. For, Thomas having paid this money in order to release Marmaduke from jail, had a good right to secure his debt by this mortgage; and although the instrument appears, on the face of it, to convey the absolute estate, yet Thomas seems to have released all further claim to the lands, the moment his debt was paid; and however absolute it may appear, yet if intended as a mortgage, it will be so considered in equity. We are therefore of opinion that this conveyance was not fraudulent; and the defendant, Ray, seems to have viewed it in the same light. For if fraudulent, he would have had a good title under his purchase at the sheriff's sale; yet he preferred the title which Curry had obtained from Marmaduke and Thomas Maples, to a deed from the sheriff. Indeed, he seemed to relinquish all idea of a title under the sheriff's sale, when, instead of getting a deed from the sheriff without paying one cent for it, he chose to give five dollars for Curry's title, although he is expressly told by Curry that he had sold the land to Medlin, and that he was no more than a trustee for said Medlin.

We are not to consider whether Ray, having notice at the time of his purchase from Curry, makes him a trustee for complainant, and, in equity, bound to convey. As to this point, it may be necessary to advert to some of the facts proved in the case. It is admitted by Ray, in his answer, that Curry told him he had sold to Medlin, and had only the naked title at law; but he says that he applied to Medlin, and he consented that Curry should convey; and it is also denied, in the answer, that he had any knowledge that complainant had ever purchased of Medlin, or had any claim to the land. It is denied, in the answer of Medlin, that he ever resold the lands to complainant, and admitted that he consented Curry should convey to Ray. On the part of the complainant, the repurchase of this land from Medlin is satisfactorily proven. But it is contended that, although the land was resold by Medlin to the complainant, yet Ray, having no notice of this contract, and having obtained the consent of the only *cestui que trust* within his knowledge, cannot be

affected by complainant's equitable title, and therefore not bound to convey. To this, we answer, that this argument is not founded on the proofs in the cause; because these facts are only stated in the answers of Ray and Medlin, to which there is a replication on the part of the complainant, and consequently the defendant, Ray, is bound to prove them. But in this proof he has failed. If, however, Ray was not held to this proof, what credit does the answer of Medlin seem entitled to, when he states that he was to give Curry forty pounds for the land, and which he must have paid; yet he is willing to let Ray have it without having anything repaid to him? His answer is expressly contradicted by several witnesses, as to the resale to complainant. This part of the case, then, being stripped of the evidence arising from the answers of Ray and Medlin, stands thus: Ray, at the time of his purchase from Curry, was expressly told by the latter that he had sold the lands, and was a mere naked trustee; in truth, that he had nothing to sell or transfer but the mere legal title, which Ray, under this notice, obtained from him. Upon this statement, there can be no doubt but that Ray became a trustee for the complainant, and bound to convey to the *cestui que trust* in the same manner Curry would have been bound. But it is said that Ray had no notice of the particular *cestui que trust*, and that general notice is not sufficient. We think it is not necessary that he should have notice of the particular *cestui que trust*; it is sufficient if he have notice that the person from whom he buys is but a mere trustee. For he is then informed that he can buy nothing; that the seller has nothing to part with, and that the moment he obtains the legal estate, he becomes a trustee for the *cestui que trust*, be he who he may. It is his business to inquire and search him out. As between the complainant and one of the defendants, this is then only the common bill for a specific performance of a contract, upon a consideration actually paid. It is one of the most ordinary subjects of relief; and the defendant, Ray, being a purchaser with notice, he is liable to the same equity, stands in his place, and is bound to do that which the person whom he represents would have been bound to do by the decree: 5 Bac. 393; 2 Ves. Jr. 440. Let a decree be entered for the complainant, compelling the defendant, Ray, to convey the lands, and to pay costs.

The principle determined here is supported by *Shaw v. Spencer*, 100 Mass. 382, and by *Duncan v. Jaudon*, 15 Wall. 165. But in California, in reference to the sale of stock by naked trustees, it is held otherwise: *Brewster v. Sims*, 42 Cal. 139. The former is, however, the correct general principle.

WARDEN v. NIELSON.

[1 MURPHY, 275.]

PENALTY, LIMIT OF RECOVERY.—In an action upon a penal bond, the plaintiff cannot recover damages beyond the penalty.

DEBT upon a penal bond conditioned for the payment of seven hundred and eighty-two dollars and twenty-one cents, and interest.

Pursuant to the instructions of the court, the jury found a verdict for the plaintiffs for one thousand five hundred and sixty-four dollars and forty-two cents, the penalty of the bond, and seven hundred and fifty dollars and ninety-five cents interest, by way of damages; subject to the opinion of the court whether plaintiff was entitled to recover beyond the penalty of the bond.

Plaintiffs relied upon *Bunbury*, 23; 2 T. R. 388; Buller's N. P. 178; 1 Tidd's Practice, 483; *Perit v. Wallis*, 2 Dallas, 252.

Defendant cited 1 East, 436; 2 Atk. 75; 6 T. R. 303; Doug. 49; Eq. Ab. 92; 3 Ves. Jr. 557.

By Court, WRIGHT, J. Whether in an action of debt on a penal bond, the plaintiff can recover a greater sum than the penalty, seems to have been a question for a long time unsettled in the English courts; but, from an examination of the cases cited upon the argument of this case, it will appear always to have been the better opinion that no such recovery could be had, at least in a court of law, until the decision reported in 2 T. R. 388, made by Justice Buller, in conformity with the opinion expressed in his law of Nisi Prius, 178. This decision, however, was afterwards overruled by Lord Kenyon, 6 T. R. 303. And in the case of *McClure v. Knight*, 1 East, Rep. 426, the law seems to have been considered by the counsel and the court as settled; for the only question made in the argument was, whether on a judgment rendered in Ireland on a penal bond, the plaintiff in a suit brought in England on such judgment, was entitled to recover beyond the penalty, which was properly decided in the affirmative, on the ground that the nature of the demand was altered by the judgment, and that it was competent for the jury to allow interest on what was there ascertained to be due. The other cases cited by the plaintiff are *Bunbury*, 23, and 2 Dallas, 252.

The first is a chancery decision, and is reported by the re-

porter in a line and a half, in which he states "that interest was decreed to be paid on a bond, although it exceeded the penalty." But none of the cases to which he refers support the principle of the decree, and some of them are entirely opposed to it. The first from Hardres, 136, was a bill to be relieved against an extent on a judgment in debt for a penalty of one thousand five hundred pounds, after satisfaction of the penalty by perception of the profits according to actual receipts, but not according to the extended value. The court would not give the complainant relief without paying costs and damages; for it appeared there had been a default in him in not permitting the defendant quietly to receive the profits upon a former extent, whereby he was put to great charges, and the court declared the plaintiff should either have all law or all equity. 1 Ch. Ca. 271, was the case of a jointress who had paid a mortgage, and she was permitted to hold over until repaid with interest. The other cases: 2 Ch. Ca. 226, and 2 Ver. 509, are in direct opposition to the principle which they were cited by Bunbury to support. To which may be added the cases reported in 1 Atk. 75; 3 Bro. 489, 496; 1 Ver. 349, referred to by defendant's counsel. The other case cited by the plaintiff's counsel from 2 Dallas, 252 (1 Am. Dec. 839), would at first view seem to conflict with the English decisions; but it is believed a distinction may be drawn between that case and those decisions. That was a suit on a penal bond conditioned for the performance of a collateral act, on a stated day, to wit, the procuring of a patent within six months for a tract of land which the defendant had sold to the plaintiff. The judges, in delivering their opinion, considered the penalty as a debt due to the plaintiff, on the day when the collateral act was to have been performed, and that upon that ground he was entitled to retain a verdict for interest beyond the penalty which the jury gave for the detention of the debt. From a review, therefore, of the cases on the subject, it may be considered as a settled point, that except in some particular cases where a collateral act is to discharge a penalty which is inserted in a bond as a debt which is to become due on the failure of performing that act on the day stipulated; or in cases in equity framed upon some specific ground or relief, the penalty of the bond is all that can be recovered, either at law or in equity. As to the question made by the plaintiff's counsel, whether there is any difference between common conditions to penal bonds and the one sued on, which binds the obligor to the amount of the condition with

interest till paid; this is nothing more than a condition in law, which would arise without its being stated in the bond, and was inserted either from an ignorance of the law, or from an excess of caution. But it cannot be considered as intended to increase the obligation of the defendant. It is, therefore, the opinion of the court that the plaintiff should enter a *remittitur* for the amount assessed for interest by way of damages.

See *Graham v. Bickham* (1 Am. Dec. 328), and note, where this subject is discussed.

HOWE v. O'MALLY.

[1 MURPHY, 287.]

CONSIDERATION OF CONTRACT.—A tract of land was conveyed, as containing a certain number of acres, more or less. Some years afterwards it was mutually agreed between the parties, that the land should be surveyed, and if found to contain more than the quantity specified in the deed, the vendee should pay ten dollars per acre for the excess, but if it fell short, the vendor was to refund at the same rate. It was held that these were mutual promises, and one was a good consideration to support an action on the other.

ASSUMPSIT. Plaintiff, by deed, conveyed to defendant, in 1790, one hundred and forty acres of land, part of a certain tract; two years later, by another deed, plaintiff conveyed to defendant the remainder, purporting to contain two hundred and twenty-one acres, "be the same more or less." These parcels were each described by metes and bounds. In 1806, the parties mutually agreed to have the tract of two hundred and twenty-one acres surveyed, and if it should be found to contain more than that number of acres, defendant agreed to pay plaintiff ten dollars an acre for the excess, and if less, plaintiff agreed to pay defendant ten dollars per acre for the deficiency. Upon the resurvey, the tract was found to contain eighty-seven acres more than the deed called for; and to recover the sum of eight hundred and seventy dollars, with interest, this action was brought.

For the defendant, it was contended that there was no consideration to support the promise; the evidence of the parol agreement ought not to have been received, as it was in direct contradiction of the solemn deed of the parties.

For the plaintiff, it was contended, that the promises were mutual, and each a consideration for the other. The agreement was not in contradiction of the deed, but perfectly con-

sistent with it; it was quite a distinct transaction, and was not intended to control, explain or vary the deed in any respect, but stood entirely on its own ground.

By the COURT. Here are mutual promises; one is made the consideration of the other, and we are of opinion, that the plaintiff's promise to refund in the event of a deficiency in the number of acres, is a good consideration to support the defendant's promise to pay, should there be more acres than called for by his deed.

Judgment for the plaintiff.

See *Bradley v. Blodget*, 1 Am. Dec. 11, and note.

SEARS v. WEST.

[1 MURPHY, 291.]

BILLIARD TABLE LIABLE TO TAX.—A billiard table erected and used merely for the purpose of amusement, is liable to the tax on "billiard tables," in the same way as if used for the purpose of gaming.

TRESPASS for having taken a billiard table from plaintiffs' possession. It appeared that plaintiffs were the owners of the table, which they had caused to be erected for their own private and individual amusement, and not for purposes of emolument, or to be used as a gaming table. The defendant had levied on the table for the tax he conceived to be due therefor to the state.

Gaston, for the plaintiffs, contended that the act of the legislature applied to such tables only as were used for purposes of gaming, and that the levy was illegal.

By the COURT. The object of the act of 1798, ch. 19, was to suppress excessive gaming, and also to remove the temptations to "idleness and dissipation," as these contributed to the main vice. The act therefore forbids the use of "gaming tables," generally, with a proviso, that it should not extend to billiard tables until the first day of April, then ensuing. The act of 1804, ch. 31, tolerates the use of billiard tables, but imposes a tax upon that use. By that act, every man who "erects and keeps" a billiard table is made liable to the tax. The legislature seems to have considered the use of the billiard table as conducive to idleness and dissipation, as well as a means by which excessive gaming was promoted. We are therefore of opinion that judgment should be entered for the defendant.

This is an interesting decision taken in connection with a late case in Iowa, *State v. Book*, 41 Iowa, 550; it being held there, that where parties engaged in playing billiards with the understanding that the loser should pay for the use of the billiard table, the owner of the table is guilty, under the statute of that state, of the offense of keeping a house resorted to for the purpose of gambling.

JACKSON v. MARSHALL.

[1 MURPHY, 323.]

RELIEF REFUSED TO PARTY TO FRAUD.—A debtor, while a suit was pending against him, in order to defeat a recovery that might be had against him in that suit, conveyed his property, by an absolute deed, purporting to be for a valuable consideration. An agreement was made at the same time that the party should reconvey the property whenever requested. A recovery against the debtor not being had, he then filed a bill to compel the party to whom he conveyed, to reconvey according to his agreement. It was held that equity would not enforce this agreement on account of its moral turpitude.

BILL in equity against Marshall's administrator and devisee to compel the reconveyance of certain property. The bill charged that for the better protection of complainant's family, complainant applied to Marshall, and pursuant to an agreement with him, conveyed to him certain real and personal property, in trust for the benefit of complainant; that after the conveyances, Marshall had declared that he held only as trustee; that it was expressly agreed that the property should be at the disposal of complainant, who was to take the profits and proceeds thereof; and that Marshall was to reconvey the same when requested to do so by complainant; that although a consideration was expressed, none was ever paid by Marshall; that he had since died, having executed a will whereby he devised the real property to his son, and directed the personal property to be sold, and the proceeds divided amongst other children.

Defendants answered that the conveyance was an absolute one; that a considerable part of the purchase-money had been paid by Marshall to complainant, who held his bond for the residue.

The jury found that the conveyances were in trust; that they were made to defeat any recovery that might be had in an action then pending against complainant as surety; that no recovery was had in said action by reason of the payment of the debt by the principal; that at the time of the conveyances to Marshall, complainant was indebted to various creditors in small amounts; but that the conveyances were not executed with intent to defraud, hinder or delay the same.

The bill, answer and findings were presented to this court for their opinion.

Cameron and Williams, for the complainant, urged that parol evidence is to be received in proof of a trust, according to the circumstances of the case: *Ross v. Norvell*, 1 Wash. 14 (1 Am. Dec. 422); that although the conveyance was executed to defeat a certain recovery, yet, as that recovery was never obtained, the plaintiff in that action cannot be considered a creditor whose claim was to be hindered or delayed; and that equity will enforce the trust.

Broune and Norwood, contra. Where a deed expresses a valuable consideration, parol evidence cannot be received to show any other consideration: 1 Ves. 128; 8 Wils. 275; 1 Bro. Ch. 92. If parol evidence is admitted, it proves that the conveyance was for an illegal consideration, and equity will not enforce such a contract: 3 T. R. 454; 4 Id. 466. It is the policy of the law to put an end to all trust and confidence between parties disposed to commit a fraud: 2 Atk. 481; 8 Ves. Jr. 461; 2 Bl. Com. 436; Prec. Ch. 103; 1 Eq. Ab. 149; Cowp. 484; Yelv. 196; 1 Ver. 100.

By Court, WRIGHT, J. It is rather a singular circumstance that claims, such as the present bill sets up, are made at this day, and attempted to be enforced without the authority of a single adjudged case to support them. That conveyances like those set forth, made under similar agreements, have before occurred, there can be little doubt; and it is equally certain, that if these agreements had ever been considered as entitled to the assistance of a court of equity, the diligence and industry of the complainants' counsel would have discovered the cases in which application to enforce them had been sustained, and relief granted. The silence of the books on the subject would seem of itself to afford strong presumptive evidence that the complainants are not entitled to the relief which they seek. But although such presumption exists, yet if they could have shown that under the influence of any of those principles which direct the decisions of our courts of equity, they were entitled to relief, the court would feel bound to grant it, notwithstanding it might seem to militate against the policy of the statutes which have been, from time to time, made for the protection and security of creditors. It is believed, that so far from granting relief to the complainants, not only the statute against fraudulent conveyances, but every principle and rule which has

been adopted and matured in courts of equity, for the purpose of suppressing fraud and of inculcating a course of fair and honest dealing among men, directly forbid it. The complainants' counsel rested their arguments much on the nature of trusts in the civil law, from which they have been taken and adopted into our jurisprudence by the courts of equity; and cases were cited to show that by that law they were enforced, although they had originated in fraud on the part of the *cestui que trust*. To this it is a sufficient answer to say, that although the courts of equity may have derived their idea of a trust from the civil law, yet that law has no binding force or authoritative influence on these courts, which are guided altogether by a set of rules and principles, peculiarly their own, that have grown out of the condition and positive institutions of the country where they have been established. The complainants' claim will derive very little weight from the consideration that it would have been enforced by a Roman *prætor*, if it be opposed by any of these rules or principles. Some reading is also cited from Saunders on Uses, and Reeves's History of the English Law, to show that trusts originated in covin, and that on their first introduction they were applied to what might be deemed fraudulent purposes; that is, to avoid the statutes of mortmain. But it is to be observed that the clerical chancellors who presided in the courts of equity at that time, did not consider these conveyances as dishonest or against conscience, and rather leaned in favor of them, and enforced the secret trusts which arose out of them, and which produced a variety of acts of parliament that were deemed necessary to prevent the fraudulent purposes to which they were applied; among others, the thirteenth and twenty-seventh of Elizabeth; of the former, our act of 1715 is nearly a copy. The complainants' counsel, however, contend that, although the statute makes the conveyances to which it alludes void, yet it does not give validity to anything, and hence an inference is drawn that when a debt is discharged, to delay the payment of which a conveyance or secret trust is made, the conveyance ceases to be binding, and the debtor becomes entitled to a reconveyance. But this argument is certainly unsound; for although the statute does not validate anything in express terms, it does by a very strong implication. It declares "that all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels," etc., made for the purposes or with the intent stated in the preamble, shall henceforward be deemed and taken "only as against that person or persons, his or their heirs, executors,

administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties and forfeitures, shall release by such covinous or fraudulent devices and practices, as is aforesaid, or shall or might be in any wise disturbed, hindered, delayed or defrauded, to be clearly and utterly void, frustrate and of no effect; any pretense, color, feigned consideration, expressing of use, or any matter or thing to the contrary notwithstanding." As to the parties themselves, therefore, it must mean that it shall be taken to be good; for that which would otherwise be good, and is declared void only as to a certain intent, remains good to all other intents; and that such has been the construction which the statute has heretofore received, may be gathered not only from the opinion of elementary writers on the subject, but from adjudged cases in the English courts, and in our own: 2 Bac. Abr. 605; Fonb. on Eq. 139; Roberts on Fraud, 643; Cro. Jac. 270; 1 Ch. Ca. 59; 2 Hayw. 848. In the case cited from Cro. Jac. the alienee was permitted to recover at law from the executors of the debtor, the property conveyed, on the ground that, although the conveyance was void as to creditors (it being made to defraud them of their debts), yet that it was good as against the person making it and his representatives. But supposing no adjudged case or elementary opinion could be found in support of such a construction, yet the object and spirit of the law would seem evidently to require it. The design and intention of the act was the protection and security of creditors; this can only be effected by destroying all confidence between the parties to secret agreements; by multiplying the difficulties which fraudulent debtors would have to encounter in attempting to defeat their claims; and denouncing every species of forfeiture and risk against such attempts, which can be raised up against them in a court of equity. The act of assembly, therefore, would seem a complete answer to the claims of the complainant. But independent of the act, the claims are in direct opposition to some of the most fundamental maxims which direct and influence the conscience of a chancellor. He who hath done iniquity, shall not have equity; he who requires the aid of a court of equity, must disclose a fair and honest transaction; are maxims which have never been departed from, and are in direct hostility to the claims of the complainants. It is true, that Francis, in his exposition of the first maxim, says that the iniquity must be done to the defendant himself, and this exposition was much relied on by the complainants' counsel. But this exposition is certainly incorrect; nor does the case cited by Francis for the

purpose, prove it. He cites a case where a person, during the great rebellion, who, in order to avoid a sequestration by the usurper, had sworn, in an answer in chancery, that he had been satisfied for a debt, was permitted to recover by a chancellor sitting after the restoration; and who, no doubt, held that the opposition to the claim was more unconscientious than the means taken to avoid the sequestration. The true exposition of the maxim is to be found in 1 Fonbl. ch. 4, sec. 13, where, after stating it, he says: "but this must be understood where such person is plaintiff," etc. And the following adjudged cases illustrate it: 2 Vern. 602; 1 Ch. Ca. 202; 1 Vern. 475; 2 Ves. 156. The case of *Gale v. Lendo*, 1 Vern. 475, was a case where the party against whom relief was sought, was in no wise to be injuriously affected by the transaction, inasmuch as she had received the money for the bond which she had given to her brother on her marriage. The obligor, however, was not permitted to recover, because he had taken it with a fraudulent intention to operate against her husband, who had died; and although he was not affected by it, nor could his estate be made liable for it, yet as it was given originally for a fraudulent purpose, it was void as against all persons. This case is also an answer to the argument of the counsel, which went to show that although a fraud was contemplated, yet none was effected, and that therefore no forfeiture should attach against complainants. The fraud consists, not in the actual injury sustained by the person intended to be injured, but in the act itself, and the turpitude of the motive which influenced the party to its commission; and that which was once a fraud, always remains a fraud: 1 Verr. 475.

It would therefore seem, from this view of the cases, that so far from complainants being entitled to relief upon any ground of equity, they are opposed not only by the statute against fraudulent conveyances, but also by the maxim, that he who hath done iniquity shall not have equity; and by the principle that no plaintiff is entitled to the aid of a court of equity to enforce a contract entered into with a fraudulent intention, and for a fraudulent purpose. This renders it unnecessary to consider the other part of the cases, that is, whether parol proof should be admitted to prove the private agreement; for if this agreement had been reduced to writing with all possible solemnity, it would not have received the aid of a court of equity for a specific performance. The bills must, therefore, be dismissed.

CASES
IN THE
CONSTITUTIONAL COURT OF APPEALS
OF
SOUTH CAROLINA.

EASTERWOOD v. QUIN.

[2 BREVARD, 64.]

EVIDENCE IN MITIGATION OF SLANDER.—Where the defendant pleads not guilty in slander, he may give evidence showing that he only repeated the words uttered by another, in mitigation of damages; all the circumstances of hearing the slander first published, and the manner of repeating it, ought to be considered by the jury, in mitigation or aggravation of the damages.

MOTION for a new trial in an action of slander. It was proved that the defendant had said of the plaintiff, that he believed the plaintiff had stolen his corn, because one Dees had told him so, and he intended to prosecute plaintiff for the theft. It was also proved, that defendant had prosecuted plaintiff, and that the grand jury had not found a bill. Defendant, in cross-examining the plaintiff's witnesses, wished to prove by them, that Dees had told the defendant that the plaintiff had stolen his corn; but the evidence was rejected, the matter not having been specially pleaded. Upon a verdict for the plaintiff, this motion was made, on the ground of the rejection of the evidence.

Nott, in support of the motion, urged that the evidence was admissible to remove the imputation of malice: 1 T. R. 110; 7 Id. 17; *Peake's cases*, 4; *Esp. Dig.* 517; and in extenuation of damages.

Gist, contra, urged that to repeat a slander, was as unjustifiable as to originate it: *Sayer*, 265; and that the truth could not be given in evidence under the general issue: *Bull. N. P.* 9.

By Court, composed of GRIMKE, WATIES, BAY, TREZEVANT, BREVARD, and WILDS, JJ. The testimony which was offered and

refused in this case was not intended in justification, and it could not prove the plea of not guilty, which goes to the speaking and not merely to the cause or occasion of speaking. If the evidence could properly justify the parties in speaking the words, yet he could not have the benefit of such evidence in justification, on the general issue; but he was clearly entitled to the benefit of it in mitigation of damages. A man who wantonly or inconsiderately repeats a defamatory tale fabricated by another, is certainly liable to answer in damages for assisting in the propagation of the slander; but he is not answerable in the same degree as the author of the slander, unless it should appear he was actuated by malice, and an intention to defame. The cause and manner of speaking are, in all cases, proper to be given in evidence, in order to guide the jury in the assessment of damages. So, if a man hears defamatory words spoken of another, and repeats them, it is proper to ascertain whether he has merely repeated them from hearing another person speak them, or whether he has only feigned to have heard the slander, when in truth he never did hear it. It shall be presumed, that he did not hear the slander from another, and the propagator of the slander is bound to show, in mitigation of his wrongful conduct, that he did hear it from another, and is not the author of it himself. As the jury would be otherwise authorized to regard him as the author of the slander, therefore he ought to be allowed to show that he is not so, and to show that he only repeated what he heard. And all the circumstances of hearing the slander first published, and the manner of repeating it, ought to be duly considered by the jury, in mitigation or in aggravation of the damages.

Motion granted.

See a similar case, *Cook v. Barkley*, 2 Am. Dec. 343.

SHIRTLIFF v. WHITFIELD.

[2 BREVARD, 71.]

DUTY OF AGENT TO INSURE.—An agent is bound to insure the goods of his principal, if so directed, after entering upon the agency. But if he is a special agent, and has no particular instructions, he is not bound or authorized to insure, unless there is a usage otherwise.

MOTION for a new trial. The principal question on the trial of this cause was, whether an agent employed by a merchant

to ship goods for him is bound to have the goods insured without particular instructions to do so. Evidence was offered of the existence of a custom among merchants, imposing such an obligation upon the agent; and the jury found in favor of such usage.

Pringle, in support of the motion, cited Marsh. 206, 218.

De Saussure and Cheves, contra.

By Court, **WATIES, J.** In all mercantile transactions, where an agent has received orders to insure goods directed to be shipped by him, he is bound to do it; or, if he be a general agent, and has no particular instructions to insure, and ships goods as such, he is bound to insure, if in the course of such transactions it is usual to insure. But this rule does not hold in regard to a special agent. He is bound by his special instructions, and no further, unless the mercantile law or custom has established additional duties. The defendants, in the present case, were special agents, and had no orders to effect an insurance. They were not bound to do so, unless under an implied obligation resulting from the usage of trade. With respect to the usage, it appears there was evidence on both sides; and the case being incumbered with other points, which may have distracted the jury, there is room to believe that the determination upon this point was not so clearly and judiciously made as upon another trial it may be; and moreover, upon a second trial, better evidence may be adduced with respect to the custom; and it is important to the commercial part of society to know certainly whether such a custom is to be relied on or not.

New trial granted.

FAIRCHILD v. BELL.

[2 BREVARD, 129.]

IMPLIED CONTRACT FROM A MORAL OBLIGATION.—Where the owner of a slave had cruelly beaten her, and had driven her away from his house and plantation, exposing her to perish for want of food and from the effects of his cruelties, and a neighboring physician from motives of humanity had taken the slave under his protection, giving her medical and other relief, it was held that an action might be maintained against the owner for such medicine and attendance, and for the maintenance of the slave during her illness, even though the defendant had forbidden the plaintiff to receive the slave or give her any assistance.

MOTION for a new trial in an action of assumpsit. The plaintiff

iff was a physician, who, seeing not far from his residence a female negro slave belonging to the defendant in the road in a miserable condition, almost naked, shockingly beaten, and having an iron on her leg of fifteen pounds weight, was induced, from motives of humanity, to take her to his house, where she was carefully attended, clothed, nourished, and cured. The action was to recover the amount of his account for medicine and attendance expended on that occasion. The defendant avowed the beating and other ill-treatment of the wench, but utterly refused to satisfy the plaintiff for his services in the care and cure of her. It was clearly proved at the trial that the defendant had exercised towards the slave a continued series of cruelties, and that she must have perished but for the humane assistance of the plaintiff. When she was brought to the plaintiff's, he informed a justice of the peace thereof, who advised the plaintiff to keep the negro and administer to her relief. The defendant was immediately applied to to furnish clothes and necessaries, but refused to do so, and was outrageously angry, and threatened to sue the plaintiff for harboring his slave.

WILDS, J., in charging the jury, said that no express contract was proved, but, on the contrary, an express dissent on the part of the defendant was proved. That if the rule were universally true that to every valid contract there must be a positive assent of both parties, it was clear the plaintiff could not recover, because the defendant had uniformly declared that he would not pay the plaintiff for his services, and it appeared that he never authorized the plaintiff to perform them. But, he said, there are cases where the law will presume an assent, and imply a promise, even where the contrary is expressly proved; as where one is under a moral obligation to do an act, and neglects or refuses to do the act, and another does it for him, there he is liable. If a man causelessly turn away his wife, or leaves her, he shall be chargeable for necessaries furnished to her, even though he should expressly declare that he will not pay for them, and should forewarn all persons not to trust her. In the present case, the law would infer a contract against the evidence of the fact, in order to compel a cruel and capricious individual to discharge that duty which he ought to have performed voluntarily. For, as the master is bound by the most solemn obligation to protect his slave from suffering, he is bound by the same obligation to defray the expenses, or services of another, to preserve the life of his slave, or preserve his slave from pain

and danger. The slave lives for his master's service. His time, his labor, his comforts, are all at his master's disposal. The duty of humane treatment, and of medical assistance, when clearly necessary, ought not to be withholden. That assistance was denied by the master in this case, and denied from the worst of motives. The plaintiff rendered those services and gave that assistance which the master ought to have procured, and, therefore, ought to be compensated. In a case so circumstanced, the law will imply a contract, from the reason, justice, and necessity of the case.

The jury found for the defendant, contrary to the judge's charge.

The motion for a new trial was argued by *De Saussure*, and was granted by the court, all the judges being present, except *WILDS, J.* No one appeared to oppose the motion.

There is probably not in the annals of the law a more shocking instance of inhumanity than is recorded in this case; but the horrible features of the case are relieved by the sound principles of humanity and justice laid down by the court who charged the jury, which had the sanction of the entire bench.

JONES v. WESTCOTT.

[2 BREVARD, 166.]

RIGHTS OF HOLDER OF PROMISSORY NOTE.—The holder of a promissory note payable to bearer, is not bound to prove that he came by the note fairly and for a valuable consideration, unless some evidence is given to raise a suspicion, at least, that he did not come fairly by the note.

ASSUMPSIT on a promissory note payable to *Sabb* or bearer. The handwriting of the defendant, the maker, was proved; but no evidence was introduced on the part of the plaintiff to show that he obtained the note *bona fide*. Defendant moved for a nonsuit, which motion *TREZEVANT, J.*, denied, ruling that the plaintiff could not be required to prove how he came by the note, unless it were first proved on the part of the defendant that he had been forbidden to pay the note to the plaintiff, by some person who laid claim to it.

A verdict was found for the plaintiff; whereupon defendant moved for a new trial in this court.

Chapple and Egan, for the defendant, cited 3 Burr. 1516; Id. 1528; 1 Id. 452; Doug. 633; 1 Bl. Rep. 478; Kyd on Bills, 86, 38.

Clifton, contra, cited 1 Esp. Dig. 39; 2 Show. 235.

By Court, GRIMKE, J. From a careful examination of all the doctrine to be found in the books on the subject, it appears that unless some evidence is given on the part of the maker of a note payable to bearer, to raise a doubt, or a suspicion, that the bearer, who sues on it, has not obtained it fairly, by delivery *bona fide*, for a valuable consideration, there will be no necessity to prove that he has come fairly by the note, but it shall be presumed; and this presumption shall be sufficient to entitle him to a verdict, except some evidence is given to overthrow it, and to raise a contrary presumption, in which case it will be incumbent on the plaintiff to prove that he came fairly by the note.

Motion rejected.

See *Ayer v. Hutchins* and note, *ante*, 232.

TEASDALE v. THE CHARLESTON INSURANCE CO.

[2 BREVARD, 190.]

LIABILITY FOR FREIGHT.—If the owner of a ship and cargo abandon to the insurers, as for a total loss by perils of the sea, and part of the goods be saved, the insurers are liable for the freight *pro rata* to the owner.

NOTICE OF ABANDONMENT.—Reasonable notice of an intention to abandon must be given to the insurers after the receipt of information justifying an abandonment; if not, the right of abandonment will be forfeited.

TIME OF ABANDONMENT.—The insured has no right to wait to ascertain the extent of loss on the sale of damaged property insured before making the abandonment; for the right to abandon cannot depend upon events subsequent to the peril.

INSURERS' LIABILITY.—The insurers are not liable for remote or consequential damages, nor for the neglect of the master when he acts directly under the insured.

MOTION for a new trial in an action on a policy of insurance.
The facts fully appear from the opinion.

Turnbull and Ward, for the defendants.

W. L. Smith, for the plaintiff.

By Court, BREVARD, J. This was an action on a policy of insurance tried before Trezevant, J., in Charleston, on forty negro slaves, valued at two hundred and fifty dollars each, at

and from St. Thomas to Charleston. It appeared in evidence at the trial that the sloop Sydney, with the negroes in question on board, sailed from St. Thomas's on the twenty-seventh day of February, 1805; that on the fifth of March, she had to labor with a heavy head sea, by which she was considerably strained; and the heavy head sea continuing, on the next day the starboard chain-plates gave way, and also the step of the mast, which went overboard, with all sails set, and tore away all the starboard side of the deck; that all hands were employed to clear the wreck, for the safety of the sloop, cargo and crew; and that they bore away for the Havana under a jury mast; that on the ninth they fell in with the ship Charlotte, of Bristol, bound to Havana, the master of which consenting to receive the cargo and crew of the Sydney, the same were transferred, and the ship arrived safe at Havana on the seventeenth, having abandoned the Sydney at sea. Among the documents produced in evidence was a letter addressed to the plaintiff by his captain, dated St. Thomas, twenty-third February, in which he says: "I arrived here the twentieth, twenty-four days from Gambia. I have on board forty slaves consigned to you. I came here for the purpose of getting some water, and some repairs done to the vessel." But no proof was adduced that the sloop was repaired. Another letter was given in evidence, written to the plaintiff, from Widow, Poey and Hernandez, dated Havana, March the nineteenth, stating that the plaintiff's captain, Gardner, had called on them, as correspondents of the plaintiff, to receive thirty-nine negroes, part of the cargo of the sloop Sydney, taken up off Abaco, by the ship Charlotte, and had requested them to receive the said negroes, and to dispose of them on the plaintiff's account, or on account of the underwriters, paying him the freight stipulated by the bill of lading, and that they would do so, and would inform the plaintiff of the condition of the slaves as soon as they should be received.

It appeared further in evidence, that the plaintiff wrote on the twenty-ninth an answer to this letter, in which he acknowledged the receipt of it, and says: "As the negroes are insured at Charleston, I am at some loss what orders to give you respecting them. I request that no time may be lost to obtain from Captain Gardner a protest, in order to recover from the underwriters; but as negroes are bearing a good price, I do not expect much loss at present. I cannot say anything respecting the returns, as I mean that the underwriters may have any advantage which may arise thereon; so soon as the protest arrives,

I can inform you of the determination of all concerned. I must suppose that whoever is to receive the returns, that sugars shipped would yield some profit." In another letter, the plaintiff writes to Gardner, that if any of the negroes were lost by the accident, to be full in his protest. Another letter, in reply to this, from Gardner, states that he has inclosed his protest, which had been made out previous to the receipt of the plaintiff's letter, and hopes it will answer; and in a postscript, adds that the negroes had been ordered to be sold on account of the underwriters and those concerned. In another letter, which was given in evidence, from Widow, Poey, and Hernandez, to the plaintiff, dated thirty-first March, they inform him that they had received thirty-nine negroes; that only six of them were merchantable. That they inclose a declaration made by four gentlemen, well versed in the African business, which they had requested, as they could not take on themselves to effect the sale of the slaves without such a document. The declaration spoken of in this letter was in evidence, and is to this effect: That the subscribers had carefully examined thirty-nine new negroes, consisting of twenty-six males and thirteen females, landed from the ship Charlotte, as part of the cargo of the sloop Sydney; and they were of opinion that only six of them were merchantable; that other six or eight of them might become so, if properly fed and attended to; but that the remainder of them were altogether unsalable, owing to their advanced age and crippled condition. A Mr. Jouve, one of the inspectors who signed this declaration, was examined as a witness at the trial, and from the report of the judge, who presided on the trial, it appears that his testimony was to the following effect: That the Spaniards do not like old negroes, and consider those old who are but middle-aged. That at the time the negroes were sold, it was difficult to procure freight for a vessel bound to Charleston, and only at very extravagant rates, from the dread of being captured by French privateers; and that considering the deplorable condition of the negroes, humanity dictated a sale of them at Havana. It further appeared from the account of sales of the negroes by Widow, Poey and Hernandez, that the negroes were sold at Havana, viz: thirty-seven sold, three having died, for four thousand six hundred and eighty-five dollars. The plaintiff claimed the sum of ten thousand dollars for forty negroes, valued at two hundred and fifty dollars each, and gave credit for the amount of the sales, deducting for freight, which was payable out of

the proceeds of the sales, the sum of twelve hundred dollars, and also for salvage, and other expenses, the sum of six hundred and seventy-nine dollars and seventy-five cents, which reduced the net proceeds of the sale to two thousand eight hundred and five dollars and twenty-five cents. This, deducted from the valuation in the policy, left a balance of seven thousand one hundred and ninety-four dollars and seventy-five cents, which the plaintiff claimed; but he allowed an abatement of two per cent., according to the terms of the policy, reducing the balance claimed to seven thousand and fifty dollars and eighty-five cents. It further appeared in evidence that the plaintiff offered to abandon to the underwriters about the tenth of May, 1805.

The verdict is in favor of the plaintiff for the balance claimed by him.

The motion before this court is, to set aside the verdict, which has been obtained, as for a total loss, and to grant a new trial. In support of this motion, it has been contended that, under the circumstances of the case, the plaintiff was not entitled to abandon to the insurers; but if he was at any time entitled to abandon, he forfeited or waived his right or privilege to do so, by his own neglect or willful delay in not signifying to the underwriters his intention to abandon within a reasonable time after he had received intelligence of the accident and misfortunes which had befallen the vessel and the cargo insured. In opposition to this, it has been argued for the plaintiff that he was under no obligation to make his election whether to abandon or not, until he could be fully informed with regard to the extent of the injury occasioned to the property insured, and of the loss thence arising, in consequence of the accidents and misfortunes which happened on the voyage; and that this could not be ascertained immediately; that it was necessary to await the result of a further inquiry and investigation into the facts and circumstances, to be able to decide satisfactorily on the right to abandon; as that could not be done till it could be ascertained whether the damage sustained was so great as to have frustrated the object of the adventure by diminishing the value of the negroes insured so much as to have rendered the adventure unworthy of further pursuit. It has been further argued, in behalf of the plaintiff, that inasmuch as it did appear in evidence that another vessel could not be procured at Havana to take the negroes to Charleston, therefore the voyage was at an end; that the object of it was totally defeated, and the plaintiff was clearly entitled to abandon.

The protest, letters and other documents which were produced in evidence at the trial, together with the testimony of Mr. Jouve, may be very fairly presumed to have disclosed everything that could have been produced, or that the case admitted of, to support the claim of the plaintiff. If any part of this evidence can be supposed to have proceeded from partiality or undue influence, yet it cannot be supposed, because there is no color of reason for supposing, that this undue bias or partiality has operated to the prejudice of the plaintiff, and in favor of the defendants. On the contrary, there are good reasons for believing that nothing has been omitted in the evidence adduced in favor of the plaintiff which could, with truth, have been unfolded to enable him to support his demand. There is no reason, however, for supposing the evidence given in his favor was not, in all respects, true, to the best of the knowledge and belief of those whose evidence was produced on the occasion. It must be recollected that the plaintiff expressly required that the protest might be full and particular, in order that he might recover against the underwriters. The protest is so full as to comprehend the adventures of a preceding voyage from the coast of Africa to St. Thomas's. The captain's letter to the plaintiff, dated the twenty-third of February, from St. Thomas's, informs him of his arrival there on the twentieth, twenty-four days from Gambia, with forty slaves. It does not appear in what condition the slaves were on their arrival, or at the time when the insurance was effected; nor whether they were all alive when the policy was signed, or at the time of the sloop's departure from St. Thomas's. The plaintiff's correspondents write to him from Havana, on the nineteenth of March, to inform him that Gardner had called on them to receive thirty-nine negroes; and in their letter of the thirty-first of the same month they inform him of their having received thirty-nine negroes. From this evidence, it may be inferred that one of the negroes insured died in course of the voyage, though from anything that appears certainly to the contrary, the death or loss of this negro may have happened prior to the commencement of the voyage from St. Thomas's. But let it be admitted that he died on the voyage, still there is no evidence to authorize the presumption that his death was occasioned by any of the perils enumerated in the policy. The most reasonable presumption is, that he perished by natural mortality, which is an accident expressly excepted from insurance by the terms of the policy. As thirty-seven of the slaves appear to have been sold, and as nothing particular

has appeared in relation to the rest, we may conclude that two others died by natural mortality. If they had perished in consequence of any of the perils insured against, it is highly probable the manner and circumstances of their death would have been particularly detailed in evidence. From the evidence which was given, there is perhaps as much reason to presume that their death was occasioned in consequence of hardships they had suffered on the voyage from Gambia to St. Thomas's, as that they died in consequence of the misfortunes which happened on the voyage from St. Thomas's. Upon this point there was no evidence which could be relied on. It must have been mere matter of conjecture. But if the evidence had been sufficient to establish the fact that the loss of these two negroes were a loss within the policy, and properly chargeable to the underwriters, yet it was not such a loss as entitled the plaintiff to abandon. The thirty-seven slaves which were sold, it appeared, were all unmerchantable at the time of the sale, except six only, and these were sold for good prices. Six or eight others were represented to the plaintiff by his correspondents as being capable of being rendered merchantable by proper care and feeding. The remainder were represented to be old and crippled.

Indulging every presumption in favor of the plaintiff, how can it be fairly collected from this evidence that the value of the negroes was diminished one-half their value, by the perils insured against? How does it appear that they were deteriorated in the voyage from St. Thomas's? No circumstances were stated in evidence from whence it can be fairly inferred that any material deterioration was produced in consequence of the misfortunes of the passage from St. Thomas's to the Havana, by wounds, bruises or other accidents, or by any uncommon hardships or sufferings, from ill-treatment or otherwise. It does not appear that they suffered any hardships, or met with any misfortune, after they were taken on board the Charlotte. From the time of the sloop's meeting the heavy head sea spoken of in the protest, until the cargo was transferred to the Charlotte, is included an interval of three or four days only. Besides, it did not appear that the negroes, though valued at two hundred and fifty dollars each, were really worth so much, nor that they had in fact suffered any diminution in their value between the commencement of the voyage and the sale. But if any such diminution can be presumed, the extent thereof is quite uncertain, as well as the particular causes thereof. The com-

parative value of the negroes at the commencement of the adventure, insured, and at the time of the sale; or rather the value at the time the misfortunes of the voyage began, and after they were over, ought to be ascertained in order to estimate the loss for which the defendants are responsible. Unquestionably, the evidence given to the jury, on the trial, was not sufficient to authorize them to say that the difference of value produced by any of the perils mentioned in the policy was such as to entitle the plaintiff, for this cause, and also by reason of salvage, and other expenses, occasioned by those perils, to abandon as for a total loss. Moreover, it is necessary to observe that the insurer is not answerable for consequential damages, or for any losses, which are not the immediate consequences of some of the perils insured against. He is not responsible for remote consequences, or such as do not follow directly from those accidents and misfortunes, which are intended to be guarded against by insurance. Now, in this case, the evidence was manifestly insufficient to satisfy a conscientious and intelligent jury, that there was any considerable damage done or loss sustained directly resulting from any of the perils insured against. Indeed, it seems difficult to form any opinion what loss was sustained in this case, and a jury might be much at loss to ascertain it, considering it in the light of partial loss, which is the light in which it ought to be regarded. It was quite clear that the evidence of loss was not sufficient to authorize the plaintiff to abandon: See 1 Marshall, 134, 161, 199.

It has been argued, however, that because the sloop was lost the voyage was also; and especially as there was no other vessel to be procured to transport the cargo to the port of delivery; and that upon this ground the plaintiff had a right to abandon. But it does not appear that any endeavors were made, or due diligence used, to procure any vessel to complete the voyage. The ship belonged to the plaintiff. It was the duty of the master to have procured another ship, if he could, to convey the cargo to the port of destination. The insurers are not answerable for this neglect of the master, in a case like this, where the master acts under immediate instructions from the assured, who is the owner. The negroes were delivered to the plaintiff's agents, and were sold very soon after their arrival at Havana. Mr. Jouve, indeed, said that, in his opinion, another vessel could not have been procured to take the cargo to Charleston, without paying a very extravagant price for it, because of the dread of capture from French privateers. But this evi-

dence was insufficient to excuse the master, and make the insurers liable; and besides, it does not appear that the master or the plaintiff intended or wished to prosecute the voyage. The plaintiff seems to have been willing to try the chance of the Havana market, which at that time was a pretty good one, and if it should turn out favorable, to proceed against the underwriters for a partial loss only; and if it should turn out unfavorable, contrary to his expectations, then to convert the partial loss into a total loss by abandonment. This intention is fairly deducible from his own letters, which were in evidence. It is the opinion of the court that if the plaintiff had a right to abandon, he forfeited that right by failing to give due and reasonable notice to the insurers of his intention to do so, after receiving advice of the misfortune which befell the sloop at sea. If he was entitled to abandon, he should have abandoned at once, and should not have waited and made his election after the sale of the negroes, and the payment of salvage and other expenses; for the right to abandon cannot depend upon events which take place after the peril is over, and the property insured is in safety: See 7 East, 43.

It was contended in the argument that the verdict ought to be set aside, because the plaintiff had no right to have the freight *pro rata itineris* included in the verdict. But we are of opinion that provided he was entitled to abandon, he was also entitled to recover the freight for the portion of the voyage performed; because, upon abandonment, the underwriters, if they receive any part of the goods, or their value, are liable for the freight of them. The goods are always chargeable for their freight, and when goods are abandoned to the insurers, the insurers, of course, are chargeable out of the goods for their freight. In this case, if the plaintiff had a right to abandon, the common agent of all parties concerned had a right to do the best he could with the cargo, until the underwriters could give instructions about them; and as the plaintiff gave credit for the sales of the cargo as so much to be deducted from the value in the policy, he had a right to deduct the freight from the amount of sales, together with other charges on the goods, as he was owner of the vessel, and stood his own insurer as to freight, or to whoever may be entitled to freight, for the part of the voyage performed.

New trial granted.

PRINGLE v. McPHERSON.

[2 BREVARD, 279.]

REVOCATION OF WILL.—Less ceremony is required in the revocation than in the execution of a will; the former may be effected by obliteration or tearing, *animo revocandi*.

OBLITERATING EXCEPTION.—An obliteration of an exception to a general clause in a will does not restore the operation of such clause, without a republication, this being considered a new devise.

REVOCATION UNDER MISTAKE.—If the revocation be ineffectual in law, or if a former will be canceled under the impression that a latter will is good, which proves invalid, the first will not be revoked; and if the devisee, under the latter will, is not legally entitled to take, the devisee under the first shall not be affected.

Issue from the court of chancery on the question of *devisavit vel non*, which was tried before Brevard, J., and a special verdict given, the particular points of which are noticed in the opinion.

Pringle, for plaintiff.

Parker, for defendants.

By Court, WILDS, J. The special verdict under which this case is submitted, amongst other things states, that the late General John McPherson executed, just before his departure to England, on or about the twenty-first June, 1803, his last will, in which, after other devises, is the following clause: "I also give and devise to my said daughter Elizabeth three hundred acres, being part of my Newton tract of land, whereof one hundred to be tide swamp, one hundred supposed to be back swamp, and one hundred acres upland; the whole quantity to be taken from the north-east end of the said tract." In another clause of the will the following devise is contained, viz: "I give and devise to my two beloved daughters Nancy and Susan, and to their respective heirs and assigns forever, equally to be divided between them as tenants in common, all my Pon Pon plantations, except the three hundred acres hereinbefore devised to my daughter Elizabeth." The special verdict states. that soon after executing this will, viz: in June, 1803, General McPherson placed it in the hands of one of his executors, and sailed for England, from whence he returned some time in the next year. That some short time after his return, his said executor, Mr. De Saussure, delivered to him his said will, without interlineation, erasure or obliteration. That some time in August, 1806, General McPherson died, leaving his widow, Mrs.

Susan McPherson, his daughter Elizabeth, his son James, and his two daughters Nancy and Susan. That after his death, his said last will was found, but the whole of the clause devising the three hundred acres, etc. (The opinion goes on to state the material facts as to the obliteration, and the undiminished affection of the testator towards his daughter Elizabeth, and then proceeds.) The said will, after a bequest to Elizabeth of seventy negroes, and to James of one hundred negroes, gives all the remainder of the testator's slaves to Mrs. McPherson and the two infant daughters. It also contains a residuary clause, giving all the rest and residue of the testator's estate, real and personal, to his wife and four children.

The questions submitted by this verdict are: 1. Whether, under all the circumstances, the erasure and obliteration of the clause in the will devising to Elizabeth three hundred acres, part of the Newton tract on Pon Pon river, be or be not a revocation of the same? 2. If it be, whether the said lands re-unite with the whole tract from whence they were carried, and pass under the devise to Nancy and Susan? 3. If not, whether the said lands in the clause so revoked, pass under the residuary clause of the said will? 4. If not, whether they are distributable as an undisposed part of the testator's estate?

It will at once be observed, that the importance of a decision on the three last grounds entirely depends upon the decision of the first. It is indeed the only question of difficulty in the whole case.

To constitute a good devise of lands, an act of 1789, and the statute of frauds, of which, in this respect, it is an exact transcript, require that it shall be in writing, signed by the person making the same, or by some other person in his presence, and by his direction, and attested by three witnesses in the testator's presence. To revoke a will thus made, it is either necessary that such intention should be expressed in writing, attested and subscribed by three witnesses, or, by destroying or obliterating the same by the testator himself, or some other person in his presence and by his direction. Less ceremony, it will be seen, is necessary in revoking than in making a will. The intention of the testator is the law of wills. Our statutory provisions form a constitution of first principles paramount to this law, to which, to be legitimate, it must conform.

Whenever the intention to devise has been expressed with requisite formalities, while suffered to exist, it remains unimpeachable, except by evidence of equal authority, and subse-

quent in date. But our acts recognizing a great fundamental principle, which pervades other institutions, as well as that under consideration, namely: that the power creating is competent to destroy, has left it in the power of a devisor at any time to revoke any will, though made by him with all possible formality, either by the destruction of the whole, or an obliteration of its parts. It is only, then, where a will, duly executed, is left in existence, that another instrument of equal authenticity is necessary to countervail its operation. In the case before the court, the will of the testator has been fully as well as legally expressed. It is not pretended that any change of intention in the testator has been expressed with equal deliberation and solemnity. It is, however, said he has revoked one of his devises in his will by a mode recognized by the law, by obliterating and canceling the clause which contained it. To this I will observe, were we to confine our inquiries entirely to the facts presented by the special verdict, and most unquestionably, in strictness, we are bound to do so, as it is our province to declare the law arising from facts, and not to declare the facts and the law involved in them, there would be no difficulty in this case, as it does not appear from anything found by the jury that these acts, which it is contended amount to a revocation, were performed by Gen. McPherson; and if not, there would be an end of the difficulty. If the circumstances which would establish a different conclusion were so feeble as not to enable a jury, the exclusive judges of facts, to pronounce him the author of this transaction, will they authorize this court to do so? Shall they undertake to declare that a will executed with more than ordinary deliberation, and at least with ordinary solemnity, where there has been no alteration in the testator's affections, and a most favorable one in his circumstances, has been revoked, because the same will is produced after his death with two of its clauses obliterated, but by whom unknown? Unquestionably not. If we were to judge from the facts before us, without recollecting the persons involved in them, would not the presumption be more natural that those erasures were made by those whose interests were impaired by the devise, and would be promoted by its revocation? It is, however, conceded in argument that this will thus obliterated was found in the desk of the testator after his death, to which, during his life, he alone had access. It seems most remarkable that a fact so important in this case should form no part of the special verdict. It is almost the only fact presented which authorizes

the inference that this alteration in the will was the act of the testator, and it goes very far in proving satisfactorily that such was the case. On my own part, I should hold most clearly that this fact, though admitted on both sides, should have no influence on the legal decision of this case, did it change the decision which ought to be given upon it; because, though such a judgment might give satisfaction to those who have heard the admission of the fact, and felt its influence, yet to posterity, who must seek alone in the archives of our transactions for a development of the principles by which we are governed, there would be ample matter, both for surprise and mortification, at our plain aberration from the well defined duties of our station.

But in the view which we have taken of this case, the admission of this fact does, in no wise, impugn the decision which ought to be given without it. I am clearly of opinion that without this fact we should have no evidence of the transaction being that of the testator, and of course it would be no revocation of the devise. I am also of opinion, that with this fact, and another which seems its consequence, viz: that the obliteration was made by the testator, the decision ought to be the same. It has been already stated, and I repeat it again, that by the provisions of our laws less ceremony is necessary in revoking than in making a will. I have endeavored to hint at the reasons for this distinction. In the present case, I admit the obliterations apparent on the face of the will are abundantly sufficient to revoke the clauses on which they are made, or even the whole will, had they extended so far, provided they were made by the testator, with an intent to produce this effect. The *quo animo* is the discriminating feature which stamps the importance of a transaction of this sort. It identifies an act equivocal in its nature with the legal effect which it is intended to produce. But, unfortunately, here again we are encountered with a difficulty which we are not legally competent to surmount. Here again the judge is called upon to officiate in the humble province of a jury. The *animo revocandi* is a question of fact which the jury should alone decide. The special verdict should have stated whether, from the facts and circumstances before them, the testator made the obliteration, and if so, with what intent he did so? The question then would have presented itself disembarrassed of extraneous matter, and would have admitted of a more correct decision. But since we are called upon to discharge duties not our own, I will endeavor to

fulfill this duty as well as I am able. Ignorant what was the testator's real intention, I will give him a reasonable and legal one; one which would influence other men in a like situation, and one which seems naturally to result from the examination of the whole transaction. Uncertain what may be the opinion of a jury on these facts, I would presume such an opinion would have been a reasonable one, and will make my own judgment the standard of what is so in this case: See Pow. on Dev. 634 *et seq.*; Cowp. 62; 1 P. Wms. 346; 3 Wils. 508; 2 Bl. Rep. 1043.

It appears to me that a careful examination of this transaction will leave but one impression as to the intention of the testator. About to depart for England, after great deliberation, and profiting by as able advice and assistance as his country afforded, he made his will, which it was then thought might probably be a final arrangement of his affairs. For his daughter Elizabeth, perhaps his first born, at all events an object of his most tender affection, he first provides. The manner of the provision shows the estimation in which she was held. Besides seventy negroes and a valuable plantation of between five and six hundred acres of land, he carves out of another estate, adjoining that first given, the three hundred acres in question, which, from description, must be immensely valuable. To his son, who was to perpetuate his family name, he gives a princely estate, much greater than that given to his favorite daughter; and for his wife and two young children, he makes ample provision. He makes his voyage to England and returns in safety; and, after the successful exertions of nearly three years, had much improved his estates. No doubt new views had begun to open to his mind, and new arrangements of his property to seem necessary. Instead of giving to his two younger daughters the remnant of his Pon Pon plantation, after carving out of it so valuable a portion for his eldest daughter, he now probably saw he was able to give them the whole estate, and to indemnify Elizabeth in some other way, if he deemed it necessary. That such must have been his intention, appears evident from a variety of considerations: 1. From the will itself; the manner in which the two obliterations are made correspond exactly with each other, and warrant this construction. The clause which gives these three hundred acres to Elizabeth is struck out, and from the clause which gives the whole of the Pon Pon plantation to Nancy and Susan, is stricken out the exception of three hundred acres previously given to Elizabeth, which leaves the devise of the whole to them in general words.

I deem it probable the testator supposed this alteration in his will would produce the effect intended, without republication, because I find even now the learned disagreeing in opinion on that point. He could not consistently have revoked his devise to Elizabeth, because he had not done justice to his other children; because, it is said, his circumstances were greatly improved. He could not have done so on account of any change of his affections towards her, because the verdict finds the reverse. He certainly did not intend to revoke his benevolence from Elizabeth in order that the subject of it might pass to his heirs in general, named in the residuary clause; because, besides the confusion which the division of this small tract into so many parts would occasion, which he everywhere seems studious to avoid, he had already most bountifully provided for them. He could not have intended to have died intestate as to this small part of his estate, because the confusion just stated would be the consequence; and there seems no apparent purpose to be answered by such a measure; and, besides, the residuary clause shows that he did not intend to die intestate at all. There seems, therefore, no reasonable motive which can be assigned to him, except that which I have attributed to him, namely: for some cause which does not appear, he changed his mind with respect to these three hundred acres, and concluded to give the whole estate, without this deduction, to his younger daughters. This intention, it has been argued for the defendants, the will, in its present shape, is legally incapable of carrying into full effect. It has been ingeniously said, the general words of this clause give the whole of the Pon Pon tract to Nancy and Susan; but the exception afterwards comes and takes away these three hundred acres. That the revocation of the exception restores the operation of the general clause, and Susan and Nancy claim the whole under the first devise, and not as a new gift. It is said the mode of revocation is equally legal with the whole or a part of the will, with any clause or part of a clause. This reasoning is not sound. It is true, the obliteration of these two clauses would, if standing alone, amount to a revocation of the devise contained in them. It is true, they restore the general words of the clause which would pass the whole of the estate to Nancy and Susan; but it is not true that these acts, without a republication, will have this effect. The words of the clause, after the revocation of the exception, become capable of conveying the whole, but do not do so, until a new manifestation of the testator's intention appears in the

mode prescribed by law. It is, as to the devisees, a new devise; as to the testator, a new estate, which he can only devise in the same mode the former was conveyed. A new clause, to be sure, is unnecessary, because the words of the first are apt to convey the whole, and only require the sanction of a new publication to become valid. At the time the will was executed, the testator did not intend to give the whole of these lands to his youngest daughters. The exception most clearly shows he did not. The correct rule I take to be that laid down in argument, namely, whatever alters either the quality or quantity of an estate devised, renders it a new devise, and requires a new publication: See 5 Com. Dig. tit. Wills.

It appears to me clear that the testator intended to revoke this devise to Elizabeth, with a view of giving the lands therein contained to Nancy and Susan. He wished them to have the whole in preference to Elizabeth; but her in preference to the rest of his heirs. And it appears to me more clear, that such intention has been defeated of its effect for want of republication. It has, however, been urged, and I believe to the conviction of some of the members of this court, that the testator may have made this obliteration with a view of amplifying the estate of his two youngest daughters; and though this act of revocation be incompetent to produce this effect for want of a republication, yet it is a good revocation of his will *pro tanto*, and the devised lands shall pass to his heirs at law as property undisposed of. To maintain this position, it seems to me, requires a total abandonment of the forementioned principle of this branch of law. A testator deliberately and solemnly executes his will. It at the time contains the expression of his entire wishes relative to his estate. Some event, unlooked for at the time, occurs, which renders a modification of his arrangements desirable. To attain this object, and this alone, he is disposed to revoke his first will. He performs an act deemed by himself sufficient for this purpose, but which, from the operation of technical rules, of which he is ignorant, fails to produce the effect. Could it be said that his will was regarded in a rule which declares this act of revocation incompetent to accomplish the object for which alone he was disposed to change his first will, and yet competent to revoke his first will altogether? Because he has unsuccessfully attempted to better the arrangements of his estate, he shall have his arrangements set aside altogether! Such a principle is equally unreasonable and unlawful. A great variety of cases to be collected from the books

very clearly settles this doctrine as reason and common sense would seem to require. In the case of *Onions v. Tysen*, 1 P. Wms. 845, one duly executed, as the law directs, his will, devising his lands to trustees, to several uses. He some time afterwards made another will, devising them to other trustees, but to the same uses; and in this will there was a clause revoking, expressly, all former wills. This will was subscribed by the testator and attested by three witnesses, yet they did not subscribe their names in the presence of the testator, and consequently it was void as to the lands. Yet it was contended it was a good revocation, so as to let in the heir at law. But it was determined that canceling a former will, under a presumption that a later will is good, which proves void, shall not operate as a revocation of the first, for where the second devisee takes nothing, the first shall lose nothing. The act of canceling is an equivocal act, which, to operate as a revocation, must be done *animo revocandi*. But in the same case it appears that where the second will barely revokes the first, without making any other disposition of the property devised, it shall be good, if executed agreeably to law.

In the present case I have already admitted that the obliteration of these clauses amounts to a revocation of the devise contained in them, did not the whole case furnish evidence that another disposition of the estate was intended by the testator to have been effected, which has failed. The case of *Bartonshaw v. Gilbert*, in Cowp. 49, recognizes the doctrine of *Onions v. Tysen*. In *Larkins v. Larkins*, 3 Bos. & Pul., Lord Alvanley says: "A revocation by obliteration will have the same effect as a revocation in any other way, and no more." And in the same case it is said: "It must be done *animo revocandi*, and the effect of the act shall extend no further than such an intention appears." In *Short v. Eastvill and Smith*, 4 East, 428-9, Lord Ellenborough sanctions the above doctrine, and declares that the cancellation of a former will, under an impression that a subsequent will was duly executed, but which was void, not being executed according to the statute of frauds, is no revocation. In the case *Ex parte the Earl of Winchester*, 7 Ves. Jr. 374, Lord Alvanley examines this doctrine at great length, reviews most of the cases to be found in the books, and concludes with these very strong words: "There is, therefore, no authority in the way of this proposition, that an instrument imperfect to the point to which it is directed, shall not operate as a revocation of a will duly executed."

Upon the whole, I am of opinion that this obliteration, if made by the testator, was done with an intention of passing the lands contained in the same to his two youngest daughters, Nancy and Susan. That this intention being defeated for want of republication, the act of obliteration does not amount to a revocation, and that the plaintiffs are entitled to judgment. This being my opinion on the first point, it becomes wholly unimportant who would have been entitled, provided this act had amounted to a revocation. I have already, however, had occasion to say Nancy and Susan could not have taken. I do not think the residuary devisees would have been entitled to the lands being otherwise disposed of at the time the will was executed. I therefore think they would have been distributable as property of the testator undisposed of.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

POPE v. CAMPBELL.

[HARDIN, SL.]

DAMAGES ON FAILURE TO DELIVER PROPERTY.—The value of any personal property at the time when it was to be delivered, with legal interest thereon, is the most equitable general rule for estimating the damages in case of a failure to deliver the property.

APPEAL from a decree of the general court. Campbell brought his action on a contract by which Pope had covenanted to pay him “a good, sound, healthy negro boy and girl between ten and fourteen years of age, on or before the tenth day of April, 1801.” Judgment was entered by default, and defendant’s counsel prayed the court to instruct the jury impaneled to inquire into the damages, that the value of the negroes immediately above the age of ten years was the measure of damages. The court, McDOWELL, THURSTON, ORMSBY, HUNTER, ALLEN and GREENUP, were of opinion “that the inquiry could by law extend to an age immediately under fourteen years, and that the jury should exercise their discretion within those limits.” Pope appealed.

By COURT. On the tenth day of April, 1801, a good, sound, healthy negro boy and girl, ten years old, would have discharged that part of the appellant’s contract; therefore the court below erred in not instructing the jury that the value of a negro boy and girl, ten years old, at that time, together with legal interest thereon until the day on which the jury rendered their verdict, was the proper rule for them to have observed; for it is conceived that the value of any personal property at

the day on which it is bargained to be delivered, together with legal interest thereon, is the most equitable general rule by which to ascertain damages where there is a failure of compliance. Indeed, when the property is of a perishable nature, and is wanted for immediate use or market, no other just rule can be discovered.

It is, however, not intended that this decision should settle the period of fixing damages in contracts for land where there has been a failure of making conveyances at the time agreed on, inasmuch as it may be found that the damages ought to be regulated by very different considerations.

Judgment reversed.

McCONNELL v. DUNLAP.

[HARDIN, 41.]

CONTRACT TO CONVEY.—If a person agree to convey five hundred acres out of one of two tracts of land, it is erroneous to decree a conveyance of two hundred and fifty acres out of each tract.

PART FAILURE OF TITLE—DAMAGES.—On a contract for a tract of land, if the vendor be able to convey but a part only, the vendee may at his election compel a conveyance of that part, and recover damages for the deficiency; or he may refuse to take such part, and recover damages for the whole.

WANT OF TITLE—DAMAGES.—A vendor commits a fraud in selling a specified tract of land, knowing he has no title. In this case the damages should be the value of the land estimated at the time of the trial, it not appearing when the contract was to be performed.

BILL for specific performance, etc. The bill was filed by the devisees of Dunlap against McConnell's heirs, and alleged that on January 1, 1780, their testator purchased from the defendants' ancestor a particular tract of land, containing five hundred acres, in the forks of the Elkhorn, and paid the most of the consideration, and gave security for the residue. McConnell agreed that if any of the land in the Elkhorn should be deficient, he would give as much out of a tract near Lexington, and a conveyance should be made as soon as patents could be obtained; and for this McConnell gave his bond to Dunlap. Dunlap shortly afterwards died, devising the land to the complainants, two of his infant children. On August 24, 1782, McConnell, by agreement with Dunlap's executor, took up the said bond, and gave another, conditioned to convey the complainants four hundred acres of good land in Kentucky, at some convenient time. The bill charged that this was fraudulently

agreed upon between McConnell and the executor, or at least the latter exceeded his authority. The bill prayed to have the latter bond set aside, and to have the first contract enforced.

The answers denied any knowledge of the transaction or the fraud. The defendants alleged that although their ancestor held the title to the said five hundred acres, a certain Patrick was equitably entitled to one-half.

The evidence in the cause showed the purchase of the five hundred acres on January 1, 1781, for which McConnell gave his bond to convey. It was further shown that McConnell had repeatedly said that Dunlap might have the five hundred acres out of his land near Lexington. There was no evidence of the time when the land was to be conveyed; nor did it appear when a patent was obtained. The court decreed a conveyance of two hundred and fifty acres of the Elkhorn tract, and two hundred and fifty acres of the land near Lexington. From this decree an appeal was taken.

By COURT. From the proofs in the cause, it sufficiently appears that a written contract was entered into on the first day of January, 1781, between Francis McConnell and Alexander Dunlap, for and in behalf of Robert Dunlap, for five hundred acres of first-rate land, lying in the forks of Elkhorn; and that McConnell had designated the particular tract. The inferior court, therefore, properly sustained the claim of the complainant for five hundred acres; but it is conceived it erred in decreeing two hundred and fifty acres of the tract lying in the forks of Elkhorn, and two hundred and fifty acres out of the tract adjoining Lexington, as from the proofs it appears that McConnell, in conversation only, observed that Dunlap might have the five hundred acres out of either tract; but it does not appear that this was inserted in the written contract; and if it had been, yet it was improper to decree two hundred and fifty acres out of each, which does not appear to have been the intention of either party, as expressed in the written contract or subsequent conversation.

This is therefore a modification of, or an addition to, the contract, which a court has no power to make, unless by consent of the parties. Nor does it appear just to compel the complainants to take the two hundred and fifty acres in the forks of Elkhorn without their consent, as it is only a part and not a full quantity to which they are entitled. And as it appears that the defendants in the court below have not a title to the five hundred acres of land contracted for and designated as afore-

said, the inferior court should have directed a jury to have been impaneled to ascertain the value of the said five hundred acres, and decreed the amount found to the complainants as damages. That the value of the said five hundred acres should be fixed at what it is worth at the time of impaneling the jury; because it appears from the defendant's answers that McConnell, at the time of the sale, had, by his prior contract with John Patrick, divested himself of one-half of the said land. It was therefore fraudulent in him to sell land to which he knew he had not a good title or claim. But if the complainants shall consent to take the said two hundred and fifty acres of land in the forks of Elkhorn, it should be so decreed; and then a jury should be impaneled to ascertain in the manner aforesaid the value of the two hundred and fifty acres of land conveyed to Patrick; and its amount should also be decreed to be paid to the complainants.

GRANT v. GROSHON.

[HARDIN, 85.]

PAYMENT OF PROPERTY, WHERE MADE.—The residence of the debtor is the place where payment in property is to be made, where no other place is agreed upon.

ALLEGING DEMAND AND REFUSAL.—Where a debt is payable on a particular day, the plaintiff need not allege in his declaration, a demand and refusal at the residence of the defendant. If the defendant were really ready and willing to pay, he should specially plead it.

ACTION of covenant by Groshon against Grant, upon a written instrument bearing date nineteenth December, 1799, for the payment of two hundred and fifty pounds “in property, such as horse creatures, cattle,” etc., at the common selling price, by the first day of May next. The breech assigned was that the defendant has not paid to the plaintiff two hundred and fifty pounds in property before the first day of May, 1800. Judgment by *nihil dicit*.

Errors were now assigned in this court because: 1. There were two declarations; 2. There is no averment that the property was demanded at the defendant's usual place of residence, nor any statement, showing an excuse for not doing so.

Rowan, for plaintiff in error, relied upon previous decisions of the court: *Chambers v. Winn*; *Letcher v. Taylor*.

TRIMBLE, J., requested the plaintiff's counsel to consider the

difference between a covenant to pay property on demand and on a particular day.

Rowan. The same principles govern. The convenience of selecting property is the reason why a payment thereof is to be made at the defendant's house; and this reason applies as strongly in the one case as in the other. Time cannot render place immaterial. Before the case of *Dandridge v. Harris*, 1 Wash. 326 (1 Am. Dec. 465), and the cases before cited, the law was, that where no place was fixed for the payment of ponderous property, but the time was fixed, the debtor should, before the day, ascertain from the creditor where he would receive the property; but these cases have changed the rule, and substituted the debtor's residence.

Clay, contra, contended that these cases did not apply; because there the property was payable on demand. Here the party might have discharged his obligation, by showing he was ready on the day at his place of residence, and the general breach assigned is sufficient. Here the property is convenient for transportation; as much so as money.

By Court, GRUNDY, C. J. This was an action of covenant, brought in the inferior court by the present defendant, against the present plaintiff, upon a writing under seal, executed by the plaintiff, Grant, by which he had bound himself to pay to the defendant, Groshon, two hundred and fifty pounds, to be discharged in such property as horses, cattle, etc., at their common selling prices, by the first day of May next ensuing the date of said writing; which writing bore date on the nineteenth day of December, 1799.

The first error assigned is: "That the plaintiff, under an order in the inferior court, giving leave to amend his declaration, filed a new one, instead of amending the declaration already filed."

This the court deem not to be erroneous, it being unimportant whether the plaintiff files an amendment only, specifying the alterations necessary in the declaration, or transcribes such parts of the declaration as are sufficient on a different paper, and adds thereto or makes therein the necessary alterations.

The second error assigned is: "That no demand of the property at the obligor's place of residence is averred in the plaintiff's declaration;" and to support this objection the cases of *Chambers v. Winn* and *Letcher v. Taylor*, decided in this court, are relied on. The court conceive there is a material difference

between those cases and the one now under consideration. In both of them the property was payable on demand, and no place of payment specified in the contract. The court determined that the plaintiff must show in his declaration that he had, before bringing his suit, demanded the property at the obligor's place of residence; because, without doing this, he had not shown that the debt was due and payable. The right to commence his action could not accrue until the demand was made at the proper place; the making of the demand was a precedent act to be performed by the obligee; and were the court to permit a recovery to be had against the obligor, without compelling the obligee to show that he had given him an opportunity, by a demand so made, to discharge the obligation in the property contracted for, it would, in fact, in all such cases, be putting it in the power of the creditor to change his property debt into money, and the debtor, by no exertion on his part, could prevent it.

In this case there is a day of payment fixed by the contract, and the decisions above referred to determine the place of residence of the obligor to be the place at which the payment is to be made. The obligor could, therefore, by plea, have shown that he was ready on his part, at the time and place, and that the payment would have been made, had the obligee attended to receive the property. When the time and place of payment are fixed, a special demand need not be averred in the plaintiff's declaration; the defendant being bound to perform the first act by producing the property for payment.

Judgment affirmed.

TARDEVEAU v. SMITH.

[HARDEN, 175.]

WHAT CONSTITUTES A USURIOUS CONTRACT.—A contract to be usurious must be substantially a lending and borrowing; and if this be understood, no shift or contrivance will enable the parties to evade the law.

STIPULATED DAMAGES.—In a contract the parties may agree on a sum as stipulated damages in case of failure; and the jury are bound by such damages so ascertained, though it exceed legal interest on the value of property which should have been paid.

ACTION on a bond by Smith's executor against Tardeveau and others. The bond, dated twenty-ninth May, 1788, had the following condition: "Whereas the above bound Tardeveau brothers are indebted to the said James Smith, two likely negroes, between the age of fifteen and twenty-five years, to be sound

and healthy; which said negroes ought to have been delivered the month of January last past; but from some circumstances it hath been inconvenient for the said Tardeveau brothers to pay the said negroes, and the said James Smith being willing to wait till the twenty-ninth of May, 1791, on receiving a reasonable hire for said negroes. Now if the said Tardeveau brothers shall well and truly pay, or cause to be paid, to the said James Smith, his heirs or assigns, two likely negro male slaves, sound and healthy, between the age of fifteen and twenty-five years, on or before the twenty-ninth of May, 1791; and also the sum of twelve pounds per annum, for each of said slaves, to commence from the first of January last past, until the said slaves shall be paid to the said James Smith, as a compensation for their services, until paid, then the above obligation to be void," etc.

On the trial the defendants moved the court to instruct the jury: "That the hire of the negroes expressed in the writing obligatory on which the suit was founded, was usurious, and as such, not recoverable; and that it would be proper to find legal interest on the value of the negroes, as it would otherwise be a greater compensation than the law contemplated."

The motion was overruled, and judgment given for the plaintiff. An appeal was taken, and the particular error assigned was error in overruling the motion as aforesaid.

Allen, for the appellants.

Talbot, *contra*.

By COURT. This court are called on to decide whether this contract be within the statute of usury. To make it so, it is clearly essential that the substance of the transaction should have been a lending and borrowing. And if it was so understood by the parties, no shift or contrivance, however disguised, can avail to evade that statute. But if, on the other hand, it was not a borrowing or lending, the converse of the proposition is equally true, that it cannot be brought within the statute. On the part of the appellant, no evidence was exhibited to show that a lending was in the contemplation of the parties. And as the contract itself does not import a loan, this court cannot presume it to have been a loan. Therefore, the contract on its face not importing a loan, and whether it was a mere colorable transaction to disguise a loan or not, being a fact which it was the peculiar province of a jury to decide, the circuit court of Lincoln were right in refusing to give the direction prayed for.

It has been contended by the counsel for the appellant, that

this case amounted to usury, because the plaintiff below recovered more damages than the value of the property covenanted to be delivered to him at the time that covenant was broken, together with legal interest thereon up to the time of the rendition of the judgment. But, as in the case of annuities (a usual mode of borrowing in England), if the annuity was really purchased, and not used as a cover to a loan, it is immaterial how low it was purchased—how good a bargain on the one side, or how bad on the other.

So in this case, if it was really, as it appears to be, a contract for the actual sale and purchase of negroes, the parties had a right to stipulate the damages that should accrue upon the breach of this contract, and also those that had previously existed. And whether a good or a bad bargain for either, neither a court of common law nor a court of equity could relieve against it.

For the non-performance of this contract, the verdict of the jury must have been in damages; the amount of which would or might have been uncertain. And it was as competent to the parties to contract for the liquidation of those damages, in such an event, as to contract for the subject-matter of the contract itself. And where a precise sum is fixed and agreed upon between them, that very sum is the ascertained damage, and a jury is confined to it.

Judgment affirmed.

A motion was made for a reconsideration of the case and overruled.

BELL v. ROWLAND.

[HARDEN, 301.]

PROMISE TO BAR STATUTE OF LIMITATIONS—To take a case out of the statute of limitations, an express acknowledgment of the debt, as a debt then due, or an express promise to pay it, must be proved to have been made within the time prescribed by the statute.

INSTRUCTION TO JURY.—In such a case the court may either instruct the jury as to the law, and leave them to determine the fact, or the court may take the whole evidence on the part of the plaintiff as true, and the facts sworn to by the witnesses as sufficiently proved, and instruct the jury as to the law arising on those facts.

WRIT OF ERROR from the circuit court. The facts appear from the opinion.

Allen, for plaintiff.

Talbot and Clay, for the defendants.

By Court, GRUNDY, C. J. The questions to be decided in this court are: 1. Whether the evidence on the part of Bell, the plaintiff in the circuit court, was sufficient to take the case out of the statute of limitations, or not; 2. Whether the court ought not to have instructed the jury as to the law of the case, and then have left it with them to determine whether an acknowledgment of the debt, or a promise to pay it, had been proved to have been made within the five years; and, 3. Whether the plea of *non assumpsit*, and the issue thereupon, is too imperfect to be sustained after verdict; especially after a general finding for the defendants, both on that plea and the plea of the statute of limitations.

Upon the first point we have had occasion to review and consider the English decisions on the construction of their statute of limitations; in hopes that, as their statute was similar to ours, we might derive from those decisions satisfactory light. But it seems to us that many of those decisions have gone unwarrantable lengths in evading the statute; and that some of them have, indeed, amounted to a total disregard of its provisions. In some cases it is said that the slightest acknowledgment will be sufficient. And in one case, where the defendant said to the plaintiff, "I am willing to settle with you, but I owe you nothing," it was adjudged such an acknowledgment of the debt as would take it out of the statute. A plain man, whose understanding had not been perverted by legal refinements and subtleties, so far from considering the expressions as an acknowledgment of the debt, or a promise to pay it, would have considered them as a positive denial of the existence or justice of the claim.

These decisions of the English courts being only their construction of their own statute, we are free to declare, we do not consider them as obligatory upon us, in giving a construction to our statute, although similar in its provisions to theirs; and that so far as they have gone upon nice refinements, for the purpose of evading the statute, they must be disregarded.

The statute of limitations, although frequently contemned, is a wise and beneficial law. It was made to prevent the raising up stale demands, after the true state of the transaction may be forgotten, through length of time; to prevent the injury that would very frequently arise from the death or removal of witnesses; and it tends to the speedy adjustment of disputes, and the suppression of perjury. No case, therefore, to which the statute had once attached should be taken out of its opera-

tion, unless it is clearly out of the mischiefs intended to be guarded against by the statute; and unless it can be brought within some general rule, intelligible to the community, so as to avoid the uncertainty so frequently the reproach of the law. If "the slightest acknowledgment;" if strained constructive acknowledgments and promises are held sufficient, it must multiply litigation, produce endless uncertainty, and, it is to be feared, a fruitful crop of perjury. Slight circumstances, and a man's loose expressions, would frequently be construed into "slight acknowledgments of the debt," when he himself neither intended to make, or understood himself as making, any acknowledgment at all. Instances of this kind, it is apprehended, are frequent in the books; but the example is too dangerous to be countenanced.

Upon the whole, we are of opinion that the only safe rule that can be adopted, capable of any reasonable degree of certainty, is that, in order to take the case out of the statute of limitations, an express acknowledgment of the debt, as a debt due at that time (coupled with the original consideration), or an express promise to pay it, must be proven to have been made within the time prescribed by the statute. And we are of opinion that the acknowledgments of David Rowland, deceased, proved upon the trial as stated in the bill of exceptions were not such express acknowledgments or promise as could, by law, take the case out of the operation of the statute.

The utmost extent of his acknowledgment was: "That he had once owed the plaintiff, but he supposed his brother had paid it in Virginia (the place where the original transaction took place, in the year 1785); and if his brother had not paid it, he owed it yet." This was far from an acknowledgment of a debt due or subsisting at that time, when he insisted the debt had been paid by his brother.

But it has been contended that if his brother had in fact paid it, he could and ought to have proved the payment. As well might it be contended that if he had paid the debt himself, he could and ought to prove it. In either case, it would be requiring of him what the statute clearly intends shall not be required; that he shall make proof of the payment. The statute goes upon the presumption that payment has been made, and that after the lapse of time, proof cannot be reasonably required.

To have bound him, he ought either to have made a promise to pay (which is not here pretended), or such an acknowledgment of the debt from which the law could imply a promise.

Now the law implies a promise where the party ought to promise; but can we say he ought to have promised, under the circumstances of the present case, the payment of a debt which he supposed had been already paid? We think we cannot.

Upon the second point, we are of opinion the court might either have instructed the jury as to the law of the case, and have left them to have determined, afterwards, the facts; or in other words, whether such an acknowledgment or promise had been made as was proved by the witnesses on the part of the plaintiff; or the court might, taking the whole of the evidence on the part of the plaintiff as true, and the facts sworn to by the witnesses as sufficiently proved, instruct the jury as to the law arising upon those facts. The latter course was pursued by the court in this case; and so far as we can discover such was the general practice in the English courts prior to the Revolution, and such has pretty generally been the practice, both in Virginia and this country.

We have seen but one case where this practice has been condemned in the British courts. It is the case of *Lloyd v. Maund*, 2 T. R. 760. There three judges, contrary to the practice adopted by the chief justice at *nisi prius*, granted a new trial, because he had not left a letter to the jury to put their construction upon it, which had been written by the defendant to the plaintiff. In which case, one of the judges, when speaking of the strongest part of the letter, says, "That, perhaps, does contain an insinuation that something was due," and therefore, he concludes, it ought to have been left to the jury to put their construction on it.

This case having been decided since the year 1776, cannot be considered as authority in this court, and can only be useful in showing to what dangerous lengths the judges of that country have gone in modern times, in order to get out of the statute.

Upon the third point, we are of opinion there is no error. The record states that "the defendant pleaded *non assumpsit*, to which the plaintiff replied generally." This, although a very informal method of making up an issue, is good after verdict. The nature of the issue to be tried could not be misunderstood, and the merits must have been as fairly tried as if the issue had been formally made up.

Judgment affirmed.

This case has been extensively cited. See, as following its authority in Kentucky: *Gray v. Lawridge*, 2 Bibb, 285; *Lansdale v. Brashear*, 3 T. R.

Mon. 332; *Hord v. Lee*, 4 Id. 37; *Rochester v. Buford*, 5 J. J. Marsh, 33; *Hard v. Manner*, Id. 259; *French v. Frazier*, 7 Id. 431; *Fisher v. Hess*, 9 B. Mon. 617; *Smith v. Dawson*, 10 Id. 114; *Hopkins v. Stout*, 6 Bush, 384. Elsewhere: *Newhouse v. Redmond*, 7 Ala. 599; *McCormick v. Brown*, 30 Cal. 186; *Kimmel v. Schwartz*, Breese, 282; *McLean v. Thorp*, 4 Mo. 259; *Shaw v. Newell*, 2 R. L. 269; *Belote v. Wynne*, 7 Yerg. 541; *Bell v. Morrison*, 1 Peters, 363.

ROGERS v. COLEMAN.

[HARDIN, 412.]

JUDGMENT OF ANOTHER STATE, VALIDITY OF. — If the judgment of another state be founded upon the appearance of the defendant, or service of process be actually made upon him, such judgment is conclusive, except so far only as it could be impeached in the courts of the state where it was rendered. But where the defendant did not appear, and had constructive notice only, as by attachment or publication, the judgment is not conclusive, but may be inquired into and impeached.

APPEAL from the circuit court. The facts of the case appear from the opinion.

Talbot, for the appellant.

Clay, contra.

By Court, **TRIMBLE**, J. Coleman and wife exhibited a bill in the high court of chancery in Virginia against John Rogers, to litigate and ascertain their claim to certain slaves and land, and the proceeds thereof; and against Thomas Pollard, who had purchased the land of Rogers, and was indebted for a part of the purchase. Rogers at the time of the exhibition of the bill was a resident of Kentucky, as was stated in the bill; and an order for his appearance was directed by the chancellor to be published according to the statute of Virginia in such cases provided.

The effects of the defendant, John Rogers, in the hands of the other defendant, Pollard, were stayed and enjoined; and the record and proceedings in a former suit in chancery, wherein said Pollard was complainant, and said Rogers was defendant, were referred to as a part of Coleman's bill.

The defendant, Rogers, not having entered his appearance to the suit of Coleman and wife, the bill was taken as confessed, as to him, and an inquiry was certified to a court of common law, to be decided by a jury, whether Larkin Rogers had attained full age at or before his death; that being the question upon which the claim of Mrs. Coleman depended.

The jury impaneled, found the time of his birth only; and refused to find the time of his death, for want of evidence.

This verdict being certified to the court of chancery, was set aside by the chancellor, and another inquiry sent down; upon which, the jury found, in May, 1802, that Larkin Rogers was a minor at his death. Upon this verdict, certified, the chancellor, in September, 1802, pronounced a decree in favor of the complainants; the appearance of the defendant, Rogers, having never been entered to this suit; which decree, according to the statute of Virginia, might be opened by the defendant, at any time within seven years next after the decree rendered (unless within that time, in the case of an absent debtor, upon his return to the country, the complainant should serve him with a copy of the decree; in which case, twelve months from the service are allowed for appearing and petitioning to have the cause reheard). Upon this decree, thus rendered, Coleman and wife, within the seven years, commenced an action in the Fayette circuit court of this state; in which cause the defendant, Rogers, offered evidence of the time at which Larkin Rogers died, for the purpose of impeaching the said decree, or discharging himself from the action; which evidence the court refused to receive, taking the decree and record of the proceedings, and evidence on which it was founded, as conclusive evidence on behalf of the plaintiff in the action, and from the judgment at common law, thus rendered upon the said decree, Rogers has appealed to this court.

If it had been a decree or judgment of the court of a foreign country, it is conceded that evidence to impeach or avoid the demand founded thereon would have been admissible; but, as it is a decree of a court of a sister state, certified according to the constitution of the United States, and the act of congress made in pursuance thereof, it must be inquired whether the effect given to it by the court was the proper one.

The constitution of the United States, article fourth, section first, declares: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." The act of the congress of the United States, passed in May, 1790, vol. 1, L. U. S., p. 115, prescribes the manner of the authentication, and then declares: "The said records and judicial proceedings, authenticated as aforesaid, shall have full faith and credit given

to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken."

How far the judgments of the courts of sister states shall, when admitted as evidence, be conclusive, or be examinable, is highly interesting, and it is desirable that it should be settled once for all. As it is desirable that this intended bond and cement of union should be regarded in the same relative strength in every state, we have looked into the decisions of the courts of other states, from whence it appears, unhappily, that the decisions in all the states are not in unison. We cannot, however, give in to such a construction of the constitution of the United States, when using the expressions, "full faith and credit," as would assign to the judgment of a sister state, no greater credibility, nor claim from us any greater faith, that the language, precepts and commands thereof were orthodox, according to the immutable principles of justice, than if it were the sentence of a foreign heterogeneous government. Such a construction would make that part of the constitution a mere senseless, dumb article. With a guarantee of a republican form of government, as given by that constitution; with one common declaration as to the rights of man in society; with homogeneous sentiments of general jurisprudence, and that similarity of trial, and of the evidence admissible on that trial, which prevails in the states—all of whom have drawn their notions of justice from the same common source—there can exist no just cause of jealousy against their different tribunals.

To give such faith and credit to the records abroad as they would have at home, is certainly giving them "full faith and credit." The constitution of the United States can require no more, and the law of congress on the subject (whether we regard the effect of the authentication, by which the credit and faith is to be demanded, or the effect of the contents of the record) can mean no more nor less.

Placing the judgments of sister states on this general equality of faith and credit, throughout the Union, by saying they ought to be examined, opened, or impeached only in that degree or extent in which they would be impeached in the state in which they were rendered, no difficulty can remain as to those judgments, where the parties had a fair trial of the merits by actual appearance and litigation; or might have had, by reason of the service of the process upon the person of the defendant, he being then within the actual jurisdiction of the court.

When a fair trial has thus been had, or the means of a full investigation have thus been afforded, it would not only encourage multiplicity of litigation, and excite a disposition to abscond after suit commenced, before the sentence of the law could be executed, but would be in violation of the plain intention of the constitution of the confederated governments, to suffer the judgments again to be opened for the purpose of permitting the parties to plead, or show in evidence that which might and ought to have been opposed to the rendering of judgment in the first instance. Such judgments ought to be conclusive, and enforced without inquiring into the grounds of them, or into the demeanor of the court or jury, who decided them, except so far as they were inquirable into by the same tribunal, or those of co-ordinate powers, in the state, from whence such judgments are, or may be, certified.

But how far judgments and proceedings founded on certain statutory provisions are conclusive, and how far they may be inquired into in the courts of the same state, will often be subjects of difficulty.

These difficulties must increase where the defendant has been subjected to a judgment, without any service of process on him personally, or without his having entered an appearance, where the process was not served upon his person, as in the cases of foreign attachment; or of constructive service of process, as by publication against the defendant (as in the present case), united with an attachment or sequestration of the effects of the defendant, or without it. Where the trial is evidently *ex parte*; where the fundamental principles and notions of a trial have been only colorably observed, and the defendant has been condemned unheard, and without any other than a constructive notice, to appear and gainsay the demand, it would be too rigid and unjust to say that such cases were contemplated by the constitution and by the act of congress. A sentence thus obtained, where (to use the language of a great judge), the defendant has had no better representative than a blanket, or a log; and in defiance of that maxim, "hear both parties," deserves not the appellation of a judgment; it seems to be rather a silent and necessary act of the court.

These cases seem to have been generally agreed, by those who have expressed judicial opinions on the subject, to form exceptions to the general rule, although their reasons have not been entirely satisfactory. They have considered the question as rather confined to the particular case, and state regulation

in each individual case, than upon principles which would apply equally to all cases of that description.

In *Phelps v. Holker*, 1 Dall, 264, it was adjudged by the supreme court of Pennsylvania, that a judgment in a foreign attachment, in the state of Massachusetts, was not conclusive evidence between the same parties in Pennsylvania; being considered as a proceeding *in rem*, and not to be extended farther than the property attached; it is, therefore, said by Chief Justice McKean, the articles of confederation ought not to be permitted to work such evident injustice and mischief as those contained in the doctrine contended for on the other side

In the case of *Kibbe v. Kibbe*, decided in the state of Connecticut, the court would not sustain an action at all on a judgment obtained in Massachusetts, where the defendant had not been served with process, saying, however, that full credence ought to be given to the judgments of courts within the United States, where both parties were within the jurisdiction of the courts at the time of the commencement of the suit, were duly served with process, and had, or might have had, a fair trial.

Jurisdiction of the courts is spoken of, and a proper attention to that subject will furnish an easy solution of those cases where the party was not served personally with process. All rights are growing out of, or attached to the person or things, which are the subjects of property; and the jurisdiction of every court must attach, either because the person is within the sphere of its authority, or because the property or effects of the person, or that which is the subject-matter of the controversy, is within that sphere. If the defendant is served within the proper limits of the state with the process of the court of that state, then the jurisdiction attaches to the greater and most comprehensive subject; the lesser is included, the right which issues out of property, or the person, is, and ought to be, conclusively determined and obligatory upon the parties, wheresoever they might go within the United States. The action being against the person, the judgment of his being concluded, ought to be as transitory as his person; nor ought he to be permitted, by removal of his person, to evade the force of the sentence.

But where the jurisdiction attaches only *in rem*, the judgment cannot rightfully be said to extend beyond the subject, and bind the person of the defendant, not only as to his right in that particular thing, but as to his personal rights generally. The utmost extent to which such a judgment could be claimed as conclusive, and to be enforced, would be within the terri-

torial limits of that state, or sovereignty, which rendered the judgment. Let us examine the consequences to which a contrary doctrine would lead. If the submission of the plaintiff to the jurisdiction of the court, and obtaining a judgment by process *in rem*, shall extend that judgment beyond that subject, and conclude the rights of the defendant, generally, wherever he may be, without the limits of that state, and within the United States; what safeguard has a defendant in any one of the states against a plaintiff who would gratuitously bestow, in his absence, an eagle, or a blanket, or a spoon, for the purpose of obtaining a judgment, by specious and colorable testimony to conclude him, by a judgment to a large amount to be sent to the state whereof he is a resident, duly authenticated, as soon as the time has expired within which, by the *lex loci*, the judgment or decree might be opened?

But if the person, on submission of the plaintiff on the one part, and an inconsiderable subject, to which the right of the defendant is said to attach, either rightfully or colorably only, is such a representation of the parties before the court, as to give the sentence general efficacy, upon all the personal rights of the defendant, as well as over his general property, to be enforced with blind obedience, by every court in the union; there is no sound distinction to be taken between such a partial constructive service of process on the defendant, and a service upon him by a publication in the newspapers, and church or court-house doors only; indeed, the latter constructive service would be the more plausible of the two, as being more public and more likely to attract his attention. If the regulation, as to opening the decree in seven years, will do to give it the cloak of justice, why will not seven months do?

Thus one state may, by her municipal regulations, exercise a jurisdiction, indirectly *extra territorium*, and enforce the claims of her own citizens upon the persons of the citizens of the rest of the states, barely by a formal application to one of the courts of justice of a sister state; which court must tamely yield to the conclusive evidence in the certified volume of *ex parte* testimony, and a sentence thereupon. Whence is this consolidating principle derived? Is it from that part of the constitution of the federal government, which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states"? Or from that part which guarantees to each state, its sovereignty and a republican form of government? Art. IV. sec. 2 and 4. If we look at

the policy of congress on this subject, with respect to their own courts, we shall find, that no suit against a citizen of the United States shall be sustained in any other district than that whereof he is an inhabitant, or in which he may be found at the time of the service of the process; and that no person shall be arrested, or held to bail, in any other district than that whereof he is an inhabitant: Vol. 1 U. S. 55. Neither the reason nor the spirit of the constitution, or of the act of congress requires that such faith and credit should be given to these sentences of courts, as to be absolutely conclusive upon the defendant, who, although named, was, in fact, never a party, but by forced construction. Such a construction appears most favorable to the harmony of the states and to the promotion of public justice, which were ends intended by the provisions of the constitution. The same impartial regard to justice, which secures a plaintiff against apprehension, fraud and accident, by receiving the record as full evidence against a defendant who voluntarily absconded after he was served with process, ought, on the other hand, to secure a defendant from a plaintiff who knowingly institutes his suit against his adversary when absent, and procures his condemnation without a hearing.

With respect to the case now before the court, it may be observed that greater faith and credit was given to the record in the court below than belonged to it in the state of Virginia. There it was inquirable into within seven years from the time of pronouncing the decree; and, if inquirable into there, it certainly was inquirable into here; indeed, it would seem most proper to expect that the courts of common law would not sustain an action at all within the seven years, upon a decree which was by law but inchoate and inconclusive as to the rights of the defendant, and only interlocutory in its nature. If they would, the multiplication of suits would be the consequence. Suppose judgment obtained in an action of debt, upon this conditional foundation the defendant, within the time limited, petitions and opens the decree; he must then file his cross-bill, or institute proceedings in the nature of a cross-bill, to be relieved from the common law judgment; and if in the mean time a judgment had been obtained here, he must have filed his bill in chancery for relief against that. The objection used against an examination here is, that it cannot be had in the same manner as in Virginia. This depends upon the will of the plaintiff in electing a court of common law or of chancery in which to prosecute his suit. If, because he chooses the common law side of the

court, his evidence is to be conclusive, then plaintiffs will never elect to sue in chancery. Thus justice must be ventured on the cost of the plaintiff's interested will, or be sacrificed as a burnt offering to its own forms; the substance will be made to yield and follow the shadow. But if by that argument it were intended that even upon a bill in equity to enforce such decree, its merits could not be inquired into by the chancellor here, but that the defendant should be sent to the very court in which the original proceeding was commenced against him, then it amounts to the position that one of the state sovereignties has no power to protect her citizens from the unjust demands set up, *ex parte*, against them in the courts of any one of the states; and that the citizens of all the states may be drawn in the vortex of one state jurisdiction to litigate and defend their rights.

This court is not called upon, by the assignment of error, to determine whether the record of the proceedings and decree in Virginia would have supported an action of debt or on the case; but only, whether the defendant below ought to have been permitted to go into and impeach the merits of the decree; or if the said decree was final and conclusive evidence.

Considering the decree as made without personal service of the process, and without the appearance of the defendant to the suit, as a proceeding *in rem*, or as a proceeding under the statute of Virginia, the record was not conclusive between the parties; the defendant in the court below ought to have been permitted to impeach it.

Judgment reversed.

This case is in harmony with the late case in the United States Supreme Court, *Pennoy v. Neff*, 95 U. S. 714, which on account of the elaborate and able opinion of Field, J., will hereafter be a leading case. See *Bartlet v. Knight* (2 Am. Dec. 36), and note, where this subject is discussed.

CHISM v. WOODS.

[HARDIN, 531.]

SALE BY BAILEE.—If a bailee sell property to an innocent purchaser, without notice, the sale transfers no right of property as against the bailor, and the latter may have recourse either to the bailee or his vendee.

WARRANTY OF TITLE IMPLIED.—In every sale of personal property by one in possession, there is an implied warranty of title by the vendor.

APPEAL from a judgment in favor of Woods, the plaintiff in an action of trover. The facts appear from the opinion.

Allen, for the appellant.

Talbot and McKinley, for the respondent.

By Court, TRIMBLE, J. Woods had judgment against Chism in an action of trover and conversion for a horse, from which Chism appealed. A bill of exceptions states that "title to the horse in the declaration mentioned was proved in the plaintiff; the defendant had purchased him of Chism May; and the following instrument in writing was produced in evidence to show how Chism May had come into possession of the horse." The writing alluded to is a bond with security, given by May to Woods, with condition which recites that May received the horse called Moonrise of said Woods, to keep for him in the state of Kentucky, upon certain terms, and for certain emoluments, which were to be divided between them, etc., and that if said May should pay over to Woods his part of the emoluments and return the horse, etc., then the obligation to be void, etc. This bond was given in South Carolina; all the parties thereto are recited to be of that state. The defendant, Chism, had purchased the horse of May. Upon this, the court instructed the jury that the said instrument of writing "gave the said May no right to sell the said horse, and that any sale made by him could not bar the plaintiff of his right, even although the defendant had no knowledge of the manner or right by which the said May held the horse; or even had no reason to suppose he was the horse of another."

The counsel for the defendant, conceiving the court had misdirected the jury, moved for a new trial, which was overruled; and the bill of exceptions to the opinion of the court in overruling the motion was sealed and recorded.

The only question to be considered is, whether the instruction of the court to the jury was proper. The instrument produced and relied on gave no authority or power to May to sell the horse; but so far as it is entitled to consideration in the case, contains a necessary implication that he should not sell. Discarding, then, the idea of power or authority expressly given, the case is plain and simple. The general rule of the law sanctioned by common sense is, that no one can, by his sale, transfer to another the right of ownership in a thing wherein he himself had not the right of property: Bro. Tresp. 295; 6 Bac. Ab. 577. No one can sell a right when he hath none to sell.

To this general rule, the sales in markets overt in England form exceptions. But if those local customs and regulations

ever obtained and had force in this country, yet the sale in this instance bears no resemblance to those. Neither reason nor policy is consulted in supposing that where the right owner has parted only with a limited qualified property, a breach of trust should divest him of the absolute and general property. Such a supposition can be bottomed only upon the erroneous application of the rules and maxims of law and equity. The maxim, "that he who trusts most shall lose most," is said to apply in favor of the purchaser. But does not he who parts with a limited qualified property or use of a specific thing capable of identification and recaption, trust less than he who pays his money, in its kind undistinguishable, to the vendor upon his affirmance or assurance that the thing sold is his own? It is a general rule, admitted as settled by repeated decisions, that upon every sale of personal goods by one who is in possession, there is a warranty by the vendor that he hath title to the thing sold. This is either express, as in the bills of sale drawn according to form, or implied by law; and upon this warranty the purchaser may have satisfaction of the vendor if his title prove deficient. Now if the bare possession of personal things shall be such conclusive evidence of property as to protect the vendee who purchased *bona fide*, unless the right owner can show that his possession was divested *male fide*, or by mere casualty, then many legislative enactments to prevent frauds upon purchasers of personal goods were mere supererogations; and the actions upon warranty of title to personal goods, so frequent in the books, could only have been necessary where a felony had been committed by some one through whose hands the goods had passed, or where, in reality, there had been a loss and finding.

We should expect to find it established as a rule that the "finding" in a declaration of trover and conversion was a substantial instead of a formal allegation; that in detinue it would be a good plea; that the goods were neither casually lost by the plaintiff nor stolen from him, or that the plaintiff should be nonsuited, if he could not make out the casualty by evidence; and that in the action by the vendee against the vendor for defective title, the declaration should aver that the possession of the vendor was not *bona fide* in addition to the allegation that the goods were the property of some other person at the time of sale. Yet we find that in detinue, property in the plaintiff, and possession in the defendant, anterior to the suit: 1 Wash. 312; in trover property properly in the plaintiff, and a conversion by the

defendant; and in actions against the vendor upon his warranty of the title; property in a stranger and the sale to the plaintiff, is all that the law requires to be made out in evidence. Let the buyer then take care that he is not deceived by dealing for a pretended title; or that the vendor is, and will be, found responsible for the loss which may otherwise befall the vendee. But it has been said that the maxim *caveat emptor* only applies to purchasers of real estate; and thus in the supreme court of Pennsylvania, of *Boyd v. Bopst*, 2 Dall. 91. But the maxim can only be restricted to that class of sales when used by the vendor against the vendee to excuse himself from an action on an implied warranty, where there was none in the deed of conveyance; then it applies in favor of the vendor, because the purchaser has the means within his power of examining the title. In this relative signification it was used in the case just mentioned; and the court proceed by saying: "The bare possession of personal goods is a strong inducement to believe that the possessor is the owner, and the bare act of selling is such an affirmation of property that, on that circumstance alone, if the fact should turn out otherwise, the value can be recovered from the seller."

Between strangers and the vendees of personal goods the maxim *caveat emptor* is properly applied to the purchaser: *Hartop v. Hoare*, Str. 1187; *Medina v. Stoughton*, Ld. Raym. 593. How can it be material in a question of general ownership, whether a vendor of a pretended title imposed upon the vendee by a possession gained by bailment or otherwise? If he was intrusted with the possession only without any authority to sell, the settler is acting *mala fide* from the time he proposes to sell, and the vendee, if he is acquainted with the nature of the trust reposed, is acting also *mala fide* in making the purchase; but if he does not know the nature or extent of the trust, nor the manner nor circumstances under which the vendor has acquired the possession, the purchaser is then acting upon the assurance given by the vendor, either expressly or by implication, that the right of absolute ownership is in himself; or if the assurance shall prove false, that he will be able to make good the loss which shall be occasioned thereby. In *Medina v. Stoughton*, the declaration was by the vendee against the vendor upon the warranty of title, the defendant pleaded that the tickets were bought by him *bona fide*, before the sale, and that he sold them *bona fide*; the plaintiff demurred, and the chief justice and the court adjudged the plea ill.

Now, it seems that if a naked bailment to a vendor should protect his vendee, the plaintiff in this case ought to have replied specially, or have taken issue on the plea. But the distinction between a pretended title, sold with possession *mala fide*, and possession *bona fide*, is not taken in any adjudged case where the plaintiff in the action relies on his general right of dominion over the thing. Those who entertain the idea that a bailee can, by a breach of trust, transfer the absolute ownership in the thing bailed to him, must give to the possession of the thing conclusive and incontrovertible evidence and faith as evidencing the right of ownership, whereas it is but strong inducement or color of title; it is but presumptive evidence liable to be rebutted, and serves as a protection against all, except the right owner.

Upon the whole, we are clear that the owner of goods may maintain trover against his bailee, who may have converted them to his own use, or at his election may have an action against the vendee for the goods themselves, or their value if detained or converted: 2 Dall. 54; that a breach of trust, whether unknown or known to the vendee, cannot change the right of property: *Vide* cases cited, and *Furnis v. Leicester*, Cro. Jac. 474; *Hartop v. Hoare*, 1 Wils. 8; 1 Bl. Com. 448-9. The moral and social duties of every member of civilized society require that it should be so; otherwise the incentives to cautious and circumspect dealing would be so far loosed as to give those who are barely honest, and only so according to municipal law, the advantage of those who are morally honest. Thus the great security for personal property would be sapped, and a large portion of good offices and benevolences would be supplanted by the fear of having a loan or other bailment of a personal thing converted into an action for damages, instead of a return of the goods themselves.

Judgment affirmed.

This is an instructive case on the law of sales, and by writers on this subject is always cited. Its doctrine is lately affirmed in *Vaughn v. Hopson*, 10 Bush, 337, and in *Patton v. McCane*, 15 B. Mon. 555, citing the case. See also *Brundage v. Camp*, 21 Ill. 334. See a similar case in New York, holding that on a sale, a warranty of title is always implied when a vendor is in possession: *Defreeze v. Trumper*, ante, 329.

EDWARDS v. HANDLEY.

[HARDEN, 602.]

WHAT CONSTITUTES DURESS.—Menaces which induce a fear of life, of mayhem, or of imprisonment, may avoid a deed; but a menace to commit a battery, to burn a house, or spoil goods, is not sufficient.

SPECIFIC PERFORMANCE, WHEN DENIED.—Equity will not decree a specific performance of a contract obtained under unfair advantages or circumstances of hardship not amounting to legal duress.

WAIVER OF EQUITY.—If a party having a good equitable defense to a contract, afterwards confirm the same, without fear or duress, and with full knowledge of his rights, it is a waiver of his equity.

EQUITABLE RELIEF DENIED.—If a party to a suit at law neglect to move for a new trial therein, having a right and a fair opportunity to do so, he has no right to relief in equity.

CONVEYANCE, WHEN DENIED.—Equity will not compel a party to receive a conveyance of land in lieu of damages, if the complainant cannot show a clear title, and although there be no other objection.

APPEAL from a decree of chancery. The facts are stated in the opinion.

Clay, Talbot and Littell, for appellant.

Allen, contra.

By Court, **TRIMBLE, J.** Edwards purchased of Charles Stewart his claim to a lot of land in Russellville; and upon the complaint of Edwards, an inquisition of a forcible detainer was taken and found against Handley. Before Edwards was put into possession of the lot, according to the inquisition found in his favor, a compromise was made between Handley and himself, by which Handley agreed to give Edwards seven hundred and fifty dollars worth of land, for which a bond was executed to Edwards, who, in consideration thereof, released his claim to the lot to Handley. Some days afterwards this bond was exchanged between the parties, for one conditioned that Handley should convey to Edwards by deed with general warranty, seven hundred and fifty acres of land, out of two tracts, one on the east fork of Panther creek, patented to Edward Carrington; the other on Rough creek, in the name of John May. "The land to be conveyed as soon as said Edwards makes his choice, or within three months at most from this date: tenth March, 1800." On this bond is this indorsement: "June 10, 1800. It is agreed to extend the within contract three months from this date; and if the said Handley should be ready to show the land sooner, the said Edwards to make his choice, whenever the said Handley gives him reasonable notice of his

being ready to show the same;" which is signed by the parties and attested.

Upon this obligation, Edwards brought suit in covenant, and recovered a judgment in the Logan district court for seven hundred and fifty dollars damages. To this judgment, Handley obtained an injunction upon a bill brought to set aside the contract, obtain a new trial, or for such relief as he should be entitled to in equity. An amended bill prays, if a perpetual injunction "should not be deemed equitable, that then a conveyance of the land be decreed, provided a title shall be produced on the trial."

The points stated in the bill as entitling the party to relief are as follows:

1. That the complainant received no consideration for the said bond; that it was given for a house and lot, which the complainant believes was in law and equity his own property, as the first improver, under terms held out by the heirs of William Russell, deceased, who were the proprietors of the survey, on which Russellville is established, promising a gratuity of a certain parcel or lot of land to settlers and improvers within the limit of the town.

2. "That the bond was extorted from him by the defendant, together with the assistance of a packed jury, and a certain Charles Stewart, who is also made a defendant." "That for fear of being dispossessed," and of the consequent loss and sacrifice of valuable property, which he had in the house, he acceded to the compromise; although he believed the inquisition erroneous, and that he could be reinstated at some time, although that time was uncertain; and because he could "spare the seven hundred and fifty acres of land without feeling a very sensible injury."

3. That in the indorsement of the bond, the words succeeding "choice" were fraudulently added without his knowledge or consent, after his signature was affixed.

4. "That on the trial of the action at law, Edwards introduced witnesses to prove the value of lands not comprehended in either of the aforesaid tracts; and who also induced the jury to believe, that it was the same lands that the aforesaid bonds called for, when, in fact, it was altogether different lands, and of a superior quality." That the complainant "had been at the expense of hiring men to explore the lands, and of resurveying them, whose veracity could not be disputed, and also had them summoned, who failed to attend."

The answer denies the charges in the bill in general terms, and in detail. Sundry depositions and exhibits are filed by the parties. Upon the hearing, the circuit court of Green decreed a perpetual injunction against the judgment at law; and "that, the complainant do, on or before the first day of September next, convey to the defendant, Ninian, seven hundred and fifty acres, agreeably to the bond passed tenth March, 1800; and it is further decreed and ordered that the defendant, Edwards, recover of the complainant all legal costs incurred in this suit."

From this decree each party prayed an appeal. Handley failed to lodge the record in this court as prescribed by statute, and his appeal was therefore dismissed. Edwards has prosecuted this, his appeal.

Upon the first point, it is well established that Stewart, from whom Edwards purchased, made an improvement on the lot in dispute, in 1794, before Handley settled in the town; that Stewart afterwards made other improvements, which Handley contends were for his use and benefit, and that he paid Stewart for them, and caused others to be made to the value of fifteen hundred dollars. But Stewart contended that the lot was his; and a dispute arose about the price which Handley should give Stewart, which the parties could not accommodate. Stewart claimed possession of the premises; and Handley said that Stewart might remove his house off the lot, but that the lot was his (Handley's). Stewart gave Handley notice, that he should pay ten pounds per day for withholding possession of the lot and appurtenances. Under these circumstances Stewart laid his claim to the lot before the trustees of the town. The question was postponed to give Handley an opportunity to contest the claim; but the trustees being satisfied by the testimony as to the claim of Stewart, adjudged the lot to him, and he, accordingly, paid the consideration therefor. Handley claims from the proprietors as an improver, under their promise as aforesaid, made to encourage settlements and improvements. This promise, if ever made, was only made by one or two of the co-heirs of Russell, of whom some were infants; and therefore this promise could give but a very partial and defective claim in equity. Whether Stewart's claim under the trustees was regular, does not certainly appear. If it were necessary to decide between Handley's and Stewart's pretensions, we are inclined to believe that Stewart's claim to the lot was the superior. To say the best of Handley's case upon this point, he shows but a doubtful equity.

As to the second point, the bill is wholly unsupported. That the jury were "packed," or that there was any unfair practice upon them, or that any unfair means were used by Edwards to procure unfit persons to be put on the inquest of forcible detainer, does not appear in evidence; but it appears that the persons composing the inquest were respectable. But the idea held out on this subject is, that Handley was dragged into the compromise for fear of loss of his property in the house, and loss of possession for a time, not from any misapprehension of his rights, nor from being overreached in the bargain by a suppression of the truth or a suggestion of falsehood.

Whether the inquisition, therefore, was erroneous or not is immaterial, as it respects the bond given by Handley. Menace of corporeal pain shall avoid a deed, but menace of his goods shall not: Noy's Maxims, 19. Menaces which induce a fear of loss of life, of member, of mayhem, or of imprisonment, may avoid a deed; but menacing to commit a battery, to burn his houses, or to spoil his goods, is not sufficient to avoid a man's deed; for if these threats should be executed, he may sue and recover damages proportioned to the injury sustained: 2 Inst. 483; Bac. Ab. tit. Duress, Gwil. ed. p. 156. These rules may be so far relaxed, in chancery, as that a contract obtained under unfair advantages and circumstances of hardship and grievance, not amounting to legal duress, will not be specifically enforced, but left to the law. Yet the complainant does not show himself entitled in equity to a relaxation of the rules of law respecting duress. He does not state that he feared illegal violence to his person or property. But his apprehension was that he would not always be present to defend himself, by his own club-law, against the officers of justice, clothed with the authority of the laws of the country. When we add to this his ratification of the contract by changing the bond on the "tenth of March," and again by indorsement of the "the tenth of June," there is not any pretext left for setting aside the compromise.

Then he was laboring under no apprehensions or menaces of violence; but, on the contrary, it was at a time when Edwards stated, as the complainant sets forth in his bill, that "he considered his interest in the bond as forfeited" by his own neglect, in not making choice within the time before alluded to; and that unless the complainant "would be so good as to extend the contract, he considered his case remediless." But the bill goes further in acknowledging the ratification of the contract to have been voluntary and unbiased; for after making

the statements last-mentioned, the bill progresses, and contains these expressions: "Neither had your orator any objections to extending the contract to any reasonable length he, the defendant, pleased." Whatever claim Handley might by possibility have been entitled to under the original contract, or upon the case between Stewart and himself, yet he has no claim to relief against a confirmation thus doubly made, and fairly obtained without any pretense of fear or duress, per BURNETT, J., *Earl of Chesterfield v. Jansen*, 1 Atk. 344, and cases cited; also Lord Chancellor's opinion, p. 349.

On the third point, there is not the shadow of proof to support the bill; but so far as the negative can be proved, it is done. The evidence is that the indorsement is regular in the same ink throughout, and the signatures at the usual and proper distance from the writing.

The fourth point the complainant attempted to support by proving that Henry Rhodes was examined as a witness in the action at law, to prove the value of the land; that he stated the land to be worth from nine to twelve shillings per acre; and several witnesses swear they do recollect that Rhodes corrected his statement, or made a second statement. But by the depositions of Armistead Morehead, George Robinson, David Davidson, Henry Grider, and Amos Balch, it appears that Rhodes did at first state the value of the land on Panther creek at nine or twelve shillings per acre; but upon hearing the bond read a second time, he corrected his statement, and stated it to be worth three shillings or four shillings and six pence per acre. That another or other witnesses were examined on the subject on the valuation of the land in the bond, and that the jury in their retirement took something like a medium. As the fact is, therefore, against the complainant, it might be sufficient to stop here. But it is necessary to negative any implication which might thence arise that the testimony of a witness examined in open court before a jury, where the parties were represented by counsel, could ever afterwards be re-canvassed in a court of chancery for the purpose of finding out whether the witness was, or was not, mistaken as to the valuation or other matter of his evidence. It was the indispensable duty of Handley, by himself or counsel, to have attended to the examination of the witness; to have required the instruction of the court to the witness or the jury, if necessary, and to have explained it by other evidence; or if he was unprepared for trial, to have asked for a continuance; if surprised by unexpected and material

evidence, which he could otherwise have explained, to have made out a proper case, and obtained or applied for a new trial. But of these things none were done. Handley went to trial without objection. He was represented by counsel who appears by no means to have been remiss. There is no evidence of any surprise or inability on the side of the complainant, which could have prevented him from making his defense; nor does it appear that he did not make all the defense his case was capable of. There is, therefore, no cause for a new trial at law, any more than for setting aside the compromise entered into when the complainant, as the whole complexion of his bill shows, was well apprised of every matter upon which he now wishes to impeach it.

The complainant has no claim to have a decree that Edwards should take the land. Waiving the question whether the plaintiff at law shall, in any case, be compelled, after a judgment at law for breach of covenant, to accept the land in lieu of the damages, Handley did not show that he had title, even on the trial of the cause. He produced a deed, made by commissioners appointed by the county court, subsequent to the exhibition of his bill, to him as locator of the tract of Edward Carrington. But whether the appointment was regular, or the statute pursued, does not appear; nor does it appear that Carrington had title.

The bond, in the condition, contains a recital that one of the tracts out of which Edwards was to have choice was patented to Edward Carrington; but this is but the recital of Handley, by which Edwards is not concluded. To the other tract, Handley showed no color of title. Before equity can compel a party to accept the land in place of damages assessed therefor at law, it must be indispensably necessary, other things not opposing, that the complainant asking such relief should show a clear title, derived regularly, to the land so to be given in lieu of the damages.

A doubtful equity ought not to prevail against a judgment at law. But Handley has not made out so much as a doubtful equity. He does not show that he was able to comply with the covenant, if Edwards had chosen the Panther creek lands; much less to give Edwards his choice of that, or the tract on Rough creek. The decree being thus radically erroneous, it is unnecessary to speak of the vagueness and uncertainty as to the land to be conveyed thereby; and whether it was to be on Panther or on Rough creek; whether Edwards was to have his

election, or Handley to lay it off at his pleasure. Upon the bill, answer and exhibits, it seems clear that Handley has no claim to relief in a court of equity.

It is, therefore, decreed and ordered, that the said decree of the circuit court be reversed, set aside and annulled; the cause is remanded to said circuit court, with directions to dissolve the complainant's injunction, with ten per cent. damages on the amount of the judgment at law, and to dismiss the bill with costs. Which is ordered to be certified, etc. It is further decreed and ordered, that the appellee pay to the appellant his costs in this behalf expended.

As to duress of one's property being a defense, see *Collins v. Westbury*, 1 Am. Dec. 643, and note thereto. As to the point of a specific performance being denied, where a clear title cannot be given, see *Butler v. O'Hear*, *id.* 671.

CASES
IN THE
SUPERIOR COURTS
OF
TENNESSEE.

McFARLANE v. MOORE.

[1 OVERTON, 174.]

WARRANTY IMPLIED.—A vendor is liable in an action on the case for unsoundness of personal property, which was known to him, and not disclosed to the buyer, where there is no express warranty, and nothing said of the soundness.

ADMISSION OF PAROL EVIDENCE.—Evidence is not admissible to contradict a written agreement, nor to detract from or add to any part of the contract, within the view of the parties, but parol evidence is admissible relative to a collateral matter to the contract. So, if on the sale of a slave, a bill of sale be given warranting the title, in an action brought for a defect in the health of the slave parol evidence may be admitted, showing unsoundness at the time of the sale, and that it was known to the vendor, and concealed by him.

MOTION for a new trial in an action on the case in the nature of deceit. McFarlane had purchased a negro woman of defendant for a full price, and had taken a bill of sale warranting the title. Defendant assumed that the negro was sound, when in fact she was not.

Evidence was introduced showing that the negro was sickly before the sale, of which fact the defendant had knowledge. A physician was offered to testify on behalf of the plaintiff, that shortly after the sale he was called to attend the negro; that he found her in such a state, occasioned by the improper use of mercury, that he thought her incurable; that the complaint had been of long standing, and that the woman afterwards died.

Whiteside, for the defendant, objected to this evidence, as the contract of sale had been reduced to writing.

Miller, for the plaintiff, urged that a sound price implied a warranty of quality: Taylor, 17; Evan's Essays, 20.

The evidence was admitted, and a verdict was found for the plaintiff. The case was now submitted upon a motion for a new trial.

OVERTON, J. The questions for the consideration of the jury were, first, whether there was a defect in the property sold; secondly, if a defect existed, was it a material one; thirdly, did the defendant know of the defect before the sale. They found all these facts in favor of the plaintiff, and have assessed his damages to the value of the negro. It has been objected that parol evidence has been improperly received; that the whole extent of the contract is embraced by the bill of sale, and nothing can be implied or presumed.

The proposition in the manner in which it is laid down, cannot be maintained. In no instance can evidence be received to contradict a written agreement, nor can such evidence be received to detract from or add to any part of the contract which was within the view of the parties when contracting. These principles, however, do not touch cases where fraud has been practiced, as where an illiterate person executes an instrument of writing which he was incapable of reading, and which was read to him otherwise than it really was written. *Suggestio falsi* and *suppressio veri* are sufficient to invalidate a contract on the ground of fraud. In these cases, too, parol evidence is receivable. The meaning of the contract evidenced by the bill of sale, was, first, to convey the property in the negro, and secondly, to warrant that property. No other ideas can possibly be collected from the writing. Nothing can be found in it respecting the health or soundness of the negro. The reception of parol proof to show the soundness or unsoundness of the woman at the time of sale does not contradict or vary the bill of sale. It is a fact collateral to its import, and agreeably to the case in 8 T. R. 379, the evidence ought to be received.

The old books on the sale of property state that where a defect in the property sold was visible, the buyer must notice it, nor will he be permitted to have any redress on that account; otherwise where the defect is invisible, and the seller knew of such defect. The civil law was different in this respect; it made the seller responsible for any invisible defect, whether known to him or not, provided a full price was given. Conformably to the principles of the civil law, we find cases of considerable authority, particularly the one cited in Taylor's

Reports, 1 (1 Am. Dec. 574); 1 Call, 316, per Lyons, J. (1 Am. Dec. 532), and 2 Swift's System, 120. The general law of contracts is, that where a consideration happens to fail, the party against whom it operates shall have redress. Where a person purchases property which to all appearance is sound and free from defects, and gives full price, it is obvious that he bottoms his contract upon the consideration of sound property; and reason seems strongly in favor of his getting sound property, or such a compensation as will make up the difference: 2 Bay, 17, 19 (1 Am. Dec. 628); Id. 380 (1 Am. Dec. 650).

The decisions in the old books must have proceeded upon an idea that defects usually arose from causes beyond the control of the owner; that property somewhat defective might be transferred from hand to hand, without the knowledge of the persons selling; that a loss must fall somewhere if a recovery is made; and where no fraud appeared by suppressing a knowledge of invisible defects, it was as reasonable that the loss should fall on the last purchaser as on any other person through whose hands it might have passed. Which is the better opinion it is not now necessary to determine. There was evidence that the defendant knew of the defect in the woman previous to the sale. If he did, and did not disclose it to the buyer, he ought to be responsible. The buyer was bound to use ordinary care only, and if by that the defect in the property was not visible, he surely ought not to bear the loss. But the principles of justice and morality were imperative on the seller to make known the real state of the property.

An objection has been made to the form of action. If an action could be maintained, it is urged that it ought to have been covenant upon the bill of sale, and not case. Covenant could not be supported, because there was nothing agreed, respecting the soundness of the negro, in the bill of sale. No instance of implied covenants is recollected in all the books, except in the sale of real property, where the words *dedi et concessi* are used: 2 Bac. Ab. 65, n.; 77, 79, n.; 2 Haywood, 127. Perhaps there may be a few other instances of this kind, but they are rare. Though the bill of sale does not cover the case, the principles of justice, of reason and the common law will. By the principles of the common law there can be no injury without a correspondent remedy. To support an action on the case it is not necessary that it should be supported by instances or precedent, but sufficient if covered by principle: 3 T. R. 63; Cowp. 37; 1 Johns. 414 (*ante*, 339), 503.

CAMPBELL, J., being related to one of the parties, did not sit.

WHITE, J., absent.

Motion denied.

See *Lanier v. Auld*, ante, 680, where the action was *assumpsit*, and it was held that an express warranty excludes an implied one. Here, it will be observed, the action was in case for the deceit, and this will account for the apparent difference in the decisions.

SMITH v. WINTON.

[1 OVERTON, 230.]

GROUND FOR NEW TRIAL.—The fact that the defendant in ejectment, against whom a verdict has been obtained, has, since the trial, discovered that the grant under which the plaintiff claimed was fraudulently obtained from the state, and that a prior grant had issued to a third person, is not sufficient ground for a new trial.

IMPEACHMENT OF GRANT FOR FRAUD.—In ejectment between adverse claimants of land, evidence is not admissible to show that the grant upon which the interest of one of the parties depends was obtained by fraud.

MOTION for a new trial made in an action of ejectment upon affidavit charging fraud in obtaining the patent granted to plaintiff's lessor, which fraud was discovered since the trial, and that a prior grant for the land had issued to a third person, which fact had also come to deponent's knowledge since the trial. Deponent Outlaw set forth that he was interested in the cause, as defendant claimed under him.

OVERTON, J. There are two grounds made for a new trial, both of which came to the knowledge of the defendant, or his agent Outlaw, since the last trial. The first is that there was fraud used in the procurement of the grant by Donelson of the fifty-thousand-acre tract; upon this part of the case it is sufficient to observe that whatever my own opinion might be respecting the reception of evidence in a court of law, to invalidate a grant for fraud, I am bound by a decision of the majority of the court. In North Carolina, we know that such evidence is not admissible, as will appear by the uniform current of decisions reported by Haywood in his first volume. Nor does the case in 2 Haywood, 98, in the smallest degree weaken other decisions on this subject, the ground of that decision being entirely different. It is, however, insisted that the third and ninth sections of the act of 1777, c. 1, warrants the introduction of any evidence which may go to show that the grant was not ob-

tained agreeably to law. What the state might do in repealing or avoiding a grant by *scire facias*, I will not undertake to say; but certain I am that the act of 1777 provides no remedy after the issuance of a grant between citizen and citizen.

It is not now necessary for me to say how the practice of permitting equitable matter to be given in evidence to a jury in ejectment, came into existence, nor whether it be consistent with legal principles or not. If it be permitted that evidence of an equitable nature may be given on one side, it cannot be refused on the other. Suppose the testimony contemplated by the first ground to be introduced it would certainly be competent to the claimant under the fifty-thousand-acre grant to introduce testimony in support of his claim. He would show that he is a purchaser for a valuable consideration, without notice of fraud; and then the defendant would be estopped. But it is argued that once a fraud always a fraud. Whence this noted aphorism could have arisen, I am not able to say. The expression is used in the case of *Baugh v. Price*, in first Wilson's reports, and if it is applied to cases similarly situated, it is correct. From my understanding of the books, it seems to be a principle clearly deducible from them, that a man who has a legal title to land, which he procured fairly, and for a *bona fide* consideration, without notice of fraud in others, never can be touched or affected in any court, either of law or equity. Fraud is an objection as it respects the purchase of real property that is always *ad hominem*: Kam. Pr. Eq. 342, 3, 4, 5 and 6; see Sugd. 86.

A new trial, therefore, cannot be granted on this ground.

In relation to the second ground taken, it will be recollected that the grant of fifty thousand acres calling for certain limits, excludes lands previously granted. Had older grants been shown on the trial, it would have effectually opposed the claim of the plaintiff; but whether we can open the case for the purpose of letting in this testimony, is another question. I am disposed to think we cannot. It would leave too great room for speculation. A man would oppose his own claim in the first instance, so as, by way of experiment, to ascertain the hard points of a cause, and if he failed, then set about hunting up another claim. Grants are of record, and the defendant might have made this discovery before trial. We are not to assist the negligence of parties.

See *Witherington v. McDonald*, ante, 603, and *White v. Jones*, 2 Am. Dec. 564.

DODSON v. COCKE.

[1 OVERTON, 814.]

IMPEACHMENT OF GRANT.—A subsequent grantee cannot avoid a prior grant on account of fraud practiced on the state in obtaining it.

PRESUMPTIONS AFTER GRANT ISSUED.—It will be presumed that after a grant has issued, it has been regularly obtained, and the entry is conclusive evidence of the payment of the consideration.

BILL for injunction and relief, which stated that defendant Cocke had obtained an elder grant for the land than plaintiff; that this grant of the defendants was obtained upon an entry as follows: 1. It was made over Brown's line for four hundred and seventy acres, which was contrary to law, as those lands were allotted to the Indians; and the entry was in the name of John Ogle for the benefit of William Parker, to whom a warrant of survey issued; 2. That the defendant Cocke procured assignment from Parker of this warrant, agreeing to pay the purchase-money to the state; 3. That neither Parker nor Cocke, nor any other person, paid the purchase-money to the state; 4. That a deception was practiced on the state in the issuing of the grant to defendant for an entry within the Indian hunting grounds; 5. That there was an agreement between the defendants that Stewart, one of the defendants, who surveyed the lands, should have an interest in it; and in consequence, Stewart fraudulently and falsely certified on the back of Cocke's warrant, that the land where it was entered was lost or taken up by a better claim, so as to authorize its removal, when, in fact, the land entered was not lost nor taken up by a better claim; 6. That the grant to Cocke states, as a consideration, the payment of ten pounds per hundred acres, indicates that the entry was made in John Armstrong's office, when, in fact, the entry was made in the county office of Washington, commonly called Carter's, where the consideration, if paid, would have been fifty shillings per hundred acres; and no money was, in fact, ever paid. This was a fraud, and, therefore, rendered the grant void. The bill prayed for discovery against Stewart, and discovery and relief against Cocke. The defendant demurred, the grounds of which appear from the opinion.

Whiteside, in support of the demurrer, said that Stewart, as appeared from the plaintiff's own statement, had no interest, and therefore, as to him, the demurrer was good; and as to Cocke, no inquiry could be made by this court as to the payment of the consideration. This must be presumed from the

fact of the entry being allowed. The plaintiff has no ground for relief in this court, as the defendant has the elder and better title.

Miller, for the plaintiff, contended that Stewart was a proper party, having an interest in the subject-matter: Mitf. 152. In relation to Cocke the law has been long settled, that if a person makes a voluntary conveyance, or conveys fraudulently, a second purchaser, though with notice, may prevail against the first, and may set aside the conveyance: 2 Fonb. 486; Mitf. 162. Fraud having been practiced upon the state in the issuance of the grant, the plaintiff is entitled to hold against it. If the demurrer as to Cocke should be sustained, it will have the effect to make good all grants, though fraudulently or improperly obtained: 2 Eq. Ca. 79.

By COURT. In this case the plaintiff, or the person under whom he claims, obtained a grant upon a removed warrant, for which the defendant had previously obtained one; and to avoid the grant of the defendant, six grounds have been taken as stated above. As several of these positions involve principles of considerable consequence to the peace of society, it may be material to consider the common law first, and see what light can be collected from thence.

Premising, however, that the concession of the plaintiff's counsel in relation to contracts seems to be correct in general, the grant of a state stands in the same situation as the contracts of individuals by deed as to principle. It is not material to inquire minutely how far, and for what causes, the state can avoid their grants upon the principle of deception. Even in England, where the acknowledged rights of royalty confer privileges unknown to the ordinary rules of law between man and man, the better opinion seems to be, that the king cannot avoid his own grants for every mistake or deception. In this respect the law seems to be correctly laid down in *Kemp's case*, 12 Mod. 78, that if the king is not deceived by the false suggestions of the grantee (which is always stated by way of recital), but only mistaken by his own surmises as to fact or inferences of law, the grant shall be good, if not contrary to the rules of law; and in such cases he cannot avoid his grant. Now, neither of the grants before us contains any recital of the suggestions or information of the parties. The grants specify the receipt of the consideration; but this is held to be unimportant; nor is the point intended to be decided that the state

cannot repeal or avoid a grant itself, where an officer has issued one without having received a consideration. If, however, the law respecting the king's grants were to decide the case, it would seem that the grant could not be avoided by the state. Conformably to the position conceded by the plaintiff's counsel, we must judge of this case as if it were the deed of an individual, with the exception of this principle, which is believed to be incontrovertible, that the state is never supposed to have committed a fraud. Frauds may be committed on them, but not *vice versa*. In the case of two individuals, could the plaintiff, under the circumstances of his case, which he has disclosed to the court, avoid Cocke's deed or grant by the principles of the common law? It occurs strongly that he could not. Previous to the statute of 27 Eliz. c. 4, a deed could not be avoided for fraud, unless the person seeking the avoidance had a claim to be prejudiced at the time the fraud was committed: 3 Co. 83; Cro. El. 445. The doctrine of Lord Mansfield, in Cowp. 434, that the common law covered all the cases embraced by the statutes of 13 Eliz. c. 5, and 27 Eliz. 4, is repudiated, so far as to enable subsequent purchasers of real estate, under particular circumstances, to avoid prior conveyances. By the common law I take it to be a clear principle that a subsequent purchaser of real estate, for a valuable consideration, could not avoid a previous voluntary or fraudulent conveyance. The ancient law did not consider a man who purchased with his eyes open, after a former conveyance (no matter for what cause it was made), as injured; therefore, afforded no remedy. In *Baily v. Merrill*, 3 Bulst. 95, Croke, J., lays down the rule to be "that fraud without damage, or damage without fraud, gives no cause of action, but where these two do concur, there an action lieth." After making the statute of 27 Eliz. c. 4, in order the more effectually to suppress fraud, the courts gave the statute an operation which the common law did not possess, to wit, that a person purchasing and taking a conveyance after a voluntary and fraudulent one, might avoid it. This statute, however, operated upon the intent of the person conveying; if he were innocent, the statute had no operation, the case stood as it was at the common law.

It appears, then, that the statute of 27 Eliz. c. 4, cannot be made to bear upon the plaintiff's case, for it will not be asserted that the state, when they conveyed the land to Cocke, intended to defraud the plaintiff, when his claim was not thought of at the place where he now claims; nor in fact can it be

legally said that they intended to defraud any person. The state itself, by deception or misrepresentation, might have been defrauded by others, but that induces a different consideration. From this view, it results that we must judge of the plaintiff's case without the aid of 27 Eliz. c. 4, and that as the defendant had previously obtained his grant, the plaintiff, who obtained one afterwards without a previous entry, cannot avoid it for fraud, misrepresentation or deception in the grantee, because that deception did not operate to his prejudice, having then no right to be prejudiced. *Res inter alias non nocet.*

We will now consider the case as it respects the land law of the state. There are three principal divisions of claims: 1. County claims; 2. Military; 3. John Armstrong's.

In order to the institution of a claim under the first division, it were necessary that a person should pay the consideration before an entry. It therefore follows, that an entry is, of itself, evidence of the payment of consideration after a grant has issued. Being matter of record, no evidence can be received to contradict it. If, in fact, no consideration were paid, the entry-taker and his securities are liable for the money.

The second kind of claims were founded upon meritorious services, of which the officers appointed by law were the judges; and after the issuing of grants, it never can be a question with the judiciary whether services were performed or not; the state, through the medium of their officers, were the competent judges of that, and their opinion should be conclusive on us.

The third kind of claims seems to admit of the same rules of law as the first. In either case, the grant is evidence in controversies between individuals that all previous requisites of the law in relation to it had been complied with; and this presumption is conclusive as to claims by entries or grants originating afterwards.

The entries in John Armstrong's office are all extant; but the grant of the defendant does not recite the entry upon which it was obtained. It acknowledges the receipt of ten pounds per hundred, and we have no legal means before us, as it respects the claim of the plaintiff, of knowing that the money was not received. If the plat annexed to the grant (which makes no essential part of it) should recite a Carter's warrant, which perhaps it does, and the grant should acknowledge the receipt of ten pounds instead of two pounds per hundred, it would not avoid it; the consideration being personal, cannot be inquired into.

How far the state itself may avoid a grant by *scire facias* for deception, we do not undertake to say; either as to the grantee himself, or persons claiming under him, with notice express or implied, from the annexation of the plat to the grant. But in all cases where the state has authorized the entering or granting of lands of any particular kind or description, on the ground contended for, then we understand that the grant is good as respects claims set on foot afterwards, notwithstanding irregularities that may have taken place in obtaining it. In the words of the grant there is no condition precedent. On its execution, the estate vested, and cannot be avoided or divested for any condition subsequent, but by the person or state making the grant: Com. Dig. tit. Condition O. 1. In these grants there are no conditions precedent; the state had therefore, for all that appears in the defendant's grant, taken upon themselves the responsibility of seeing that the preliminary requisites of the law were complied with. If they had not, the state grants here would contain recitals of the information of the grantees upon which they were made, as by the English law they must do, or the king takes a knowledge of the consideration on himself.

By the same law a purchaser must look to the title he is buying from its foundation; at least as far back as any statute of limitation would run—sixty years in England. If he is purchasing an estate derived under the grant of the king, that grant would disclose that it was made upon certain suggestions, on the truth of which the estate would always depend. The purchaser then would know, from the grant, the consideration, the verity of which it would be incumbent on him to ascertain.

Apply the same principles to our grants, and they will be correct as to under or second purchasers, but never can otherwise.

It is, however, worthy of remark, with respect to these recitals, that in England they found it necessary to pass many statutes for the quiet of purchasers, who derived their claims under the crown.

The ideas of Mr. J. Yeates, of Pennsylvania, 4 Dall. 204–5, upon a similar occasion, are not inapplicable on this. When speaking of land forfeited to the government, he observes: “If the lands are forfeited in the eye of the law, though they have been fully paid for, the breach of the condition can only be taken advantage of by the commonwealth in a method prescribed by law. Innumerable mischiefs and endless confusion would ensue from individuals taking upon themselves to judge

when warrants and surveys (and grants too in this country), cease to have validity;" or whether any in the commencement, if issued by the state, might be added, "and making entries on such land at their will and pleasure." If the expressions of the law were not as particular as we find them, we should have no difficulty in pronouncing that no persons should take advantage of their own wrong; and that it does not lie in the mouth of men like those we are speaking of, to say that warrants are dead; that we will take and withhold the possession, and thereby entitle ourselves to reap benefits from an unlawful act.

The circumstance of the entry having been over Brown's line can have no effect; the entry being valid at the time it was made. We cannot notice the date of the survey in this case, there being no law of North Carolina directing that it should be made a record, as there now is by the law of this state.

The arguments of the defendant's counsel respecting the parties to the suit and removals seem to be correct.

Demurrer allowed and bill dismissed.

BOYD v. ANDERSON.

[1 OVERTON, 438.]

WARRANTY OF TITLE.—A warranty of title is implied on the sale of an unnegotiable chose in action, and the purchaser acquires the right, and assumes the risk of its value; where it is, in fact, void, the buyer is entitled to recover the price, although the seller was innocent of any fraud, and ignorant of the defect. Accordingly, when a land warrant was sold, and it was subsequently declared void, the purchaser may recover back the consideration paid.

MOTION for new trial in an action on the case. The declaration contained a count stating the sale of a land warrant of six hundred and forty acres for five hundred dollars, which warrant was afterwards pronounced void by commissioners duly appointed; and also a count for money had and received. It appeared that plaintiff held defendant's bond conditioned for the conveyance of six hundred and forty acres; that defendant procured one Lytle to assign the warrant in question for that number of acres, whereupon the bond was delivered to defendant. Neither plaintiff, defendant nor Lytle knew that the warrant was invalid. It was conceded that the warrant was an unnegotiable chose in action. The question then was whether the consideration paid for the warrant could be recovered back.

OVERTON, J. The history of the assignment of unnegotiable paper has been given with much correctness and perspicuity, by Buller, J., in 4 T. R. 340. By the common law, ordinary bonds or obligations were not assignable; but for a valuable consideration they were sustained in equity at all times: 2 Wooddes. 388. The case in 4 T. R. 340, together with many others to be found in the late reporters, shows clearly that in modern times the courts in England are approaching to the good sense of the rule long since established in equity. They consider the assignee as having an interest in the demand, and will not, where a suit is pending in court for the use of such person, permit the assignor to intermeddle with it, or in any manner to extinguish the demand. So far have they gone in the common law courts in England, in relaxing the original principles, but no further. After this decision, the legislature of that country had as well have gone the whole length of authorizing the transfer or sale of such choses in action, in the same manner that the common law, in common with those of every other nation, recognizes the sale of any other property. The reasons given by law-writers, why choses in actions were not allowed to be assigned, were that it encouraged litigation, by claims of this kind getting into the hands of others, of a more litigious disposition, and of greater weight and influence in society, "whereby (said Lord Coke) justice might be trodden down." A very unsatisfactory reason indeed, in any country, but perfectly unintelligible in one of equal laws and liberty. The opinion of the court of chancery, with the present practice in the other English courts, demonstrate that if ever there was any reason for the rule, it has ceased as it respects personal demands.

Our act of 1801, c. 6, s. 54, has expressly said what is implied from the adjudication of the English judges, that it is lawful to sell or transfer common choses in action. "Suits," says the act, "may hereafter be brought both in courts of law and equity, in the names of assignees of bonds, with collateral conditions, bills or notes for specific articles, or the performance of any duty."

Agreeably to the common law, an assignee acquired no kind of interest—he was forbidden to acquire such interest. Therefore, the assignment did not operate anything; it were the same thing as if a blank stood in its place. When courts of equity recognized assignments for valuable consideration, it was cautiously done; they did not proceed on principles analogous to

those governing bills of exchange, and other negotiable choses in action. In these transactions the assignor is liable for the amount of the bill, if not to be had of the drawee. They decided that the assignee took an unnegotiable paper subject to every equity and objection that might be sustained against it in the hands of the obligee. This principle is not affected by our act, which only authorizes an assignee to maintain an action in his own name. The act legalizes the acquisition by the assignee, and there it stops.

This being the state of things, we will proceed to examine the general principles to be found in the books respecting the action for money had and received, and see whether any of those principles cover the case before the court.

The science of law is much indebted to the distinguished talents of Lord Mansfield, for having brought this useful form of redress to perfection. Let us review the principles established by that great man, and other judges. His principles in this respect were principally derived from the Roman law; and there certainly is a striking likeness between the civil and our law, respecting these actions. That law, when speaking of actions *quasi ex contractu* under the division of *innominate contracts*, has a kind of action termed *actio in fructum*, or in *prescriptis verbis*, answering to our action on the case. Under this class they had their *condictio indebiti*, or to recover back money paid by mistake, and *condictio causa data non secuta*, or to recover back money on account of the failure in the consideration. The cases of *quasi contracts* rested upon the same ground with implied *assumpsits*. The principles of the two laws were, in some respects, different. Lord Mansfield's great predilection for the Roman law, it is believed, carried him too far upon the main ground in the case of *Moses v. Macferlan*, 2 Burr. 1005. One question in that case was, whether the action could be maintained, the action having previously been *sub judice*, and money paid under the authority of a court of competent jurisdiction. The opinion of the judge was, that notwithstanding this objection, an action for money had and received, might be supported. Though the general principles and reasoning of Lord Mansfield in that case were characteristic of a great and comprehensive mind, we cannot agree with him. Upon the principle that it had been previously litigated, the action ought not to have been sustained. This seems to be the decided opinion of Lord Kenyon: 7 T. R. 269. The reasoning of Lord Mansfield in other respects is a great present to the profession.

The ideas he entertained respecting this action were, that it lies wherever *ex æquo et bono*, the defendant ought to refund, and where consistent with equity and conscience, he cannot retain the money in his hands. In 2 T. R. 370, Buller says, that a person cannot recover in this action, unless the case would be thought equitable, and so determined, if it were before a court of equity. Hence, Lord Mansfield in Burr. 1005, Cowp. 197, as well as Judge Buller, compares it to a bill in equity.

From Lord Holt's time, we find the judges frequently stating that these actions had been extended of late years. In the case of *Holms v. Hall*, 6 Mod. 161, Holt complains of these extensions, and observes, that "nobody would more willingly check them than I would." I am far from agreeing with Lord Holt, for it would seem that the extension of this action has contributed to expedite justice. It is concise, unperplexed with verbose pleading, and has almost rendered bills in equity unnecessary.

Useful as this form of action is, it should not be forgotten that the courts will never suffer the general terms in which it is conceived, to produce surprise on the opposite party, nor allow of the action in case of a special warranty of goods, or where a special contract is still open.

In the case of *Moses v. Macferlan*, Lord Mansfield says, "that the extending of the action for money had and received, depends on the notion of fraud; as if one man takes another's money to do a thing, and refuses to do it, it is a fraud, and he may sue upon the agreement, or may disaffirm it *ab initio* by reason of fraud, and bring an action for money had and received. This in general is correct, but the decisions have gone further, and approach nearer to the civil law. The decisions seem to rest on one or the other of two principles, fraud or implied warranty.

From the opinion entertained in the case of *Moses v. Macferlan*, it will easily be perceived that the notion of fraud forms the ground of most of these kind of condictional actions. Those referable to this head are:

1. To recover money paid by mistake, as in *Skin.* 411, 412, pl. 7; 1 Salk. 22, pl. 2. It is fraudulent to retain money thus erroneously paid. But it must be a mistake as to fact, and not law.

2. To recover money paid under a void authority, or upon an agreement declared void for irregularity by the legislature, or by them declared void, being against public policy, as in 1 Vin.

Ab. 268, pl. 5; 1 T. R. 732; having been paid under a wrong impression, it is fraudulent to retain.

3. When a defendant gets money into his hands which ought in equity to belong to the plaintiff, without having had any kind of contract with him, and which it were fraudulent in him to retain, as in 2 Ld. Raym. 1007; Buller's N. P. 130; 1 T. R. 403, 387; Cowp. 419, 197; Burr. 1005; 1 Bay, 56.

4. Where money has been paid by compulsion, or constraint, as in Str. 915; 4 T. R. 485, it is a fraud to retain it.

5. In cases of fraud apparent in the original transaction, as in Skin. 411, 412; 1 Vin. Ab. 268, pl. 4; 1 Salk. 22; 11 Mod. 146, 147; Cowp. 805; 4 T. R. 182; 1 H. Bl. 665; or for money got through imposition, extortion, oppression, or undue advantage taken of the plaintiff's situation. Here again is fraud: 1 T. R. 286.

6. Where the consideration has failed as for earnest, when the bargain has fallen through on account of a bargainer's refusal, etc. Premiums where a ship did not sail on her voyage, etc.: 6 Mod. 161; Burr. 1005. In all these cases it is fraudulent to retain the consideration, and thus, in the language of Lord Mansfield, the notion of fraud was at the bottom.

We will now notice cases in which this action was repelled. It seems to be a general principle pervading all the cases, that it lies only where the principles of justice require it, and not then, if opposed by public policy.

In relation to the first, or where justice did not require it, because both parties acted with a full knowledge of all the facts and circumstances, and the consideration happened to fail, it was determined that this action would not lie: 1 Esp. Ca. 279; 4 T. R. 561; 1 Id. 225. This rule equally holds where the plaintiff and defendant are equally innocent, or equally guilty. If the contract be illegal, and the parties be equally guilty, no action can be maintained. Cases where the parties have been equally innocent may be found, as in 1 New Rep. 260. The defendant had obtained a patent for an invention, supposing himself to be the first inventor; he sells to the plaintiff for the term of fourteen years, who enjoys the benefit of it five years, when it is repealed at the instance of another person, who had previously invented it. This action was brought for the consideration paid, on account of the failure in the same. The court conceived the action did not lie, as both parties supposed the patent was good, as there was no fraud nor deception, and as the plaintiff had enjoyed it part of the time. On the

part of the plaintiff it was insisted that as the defendant was not the inventor, he never had a right to the invention, and therefore ought to refund. This decision is conformable to the principle that the plaintiff, in ordinary cases, can only recover where the defendant cannot conscientiously retain; and conformable to the observations of Lord Mansfield, in *Neal v. Price*, Burr. 1354, whose words are: "In this action the plaintiff cannot recover the money, unless it be against conscience in the defendant to retain it, and great liberality is always allowed in this sort of action;" and further, "it was a misfortune that had happened without fault or neglect. If there were no neglect in the plaintiff, yet there was no reason to throw off the loss from one innocent man upon another innocent man." Between two innocent men, a court of law or equity will always be neutral, unless the law raises an obligation.

In the case before the court, fraud is not suggested on the part of the defendant; it is proved there was none. Both parties are equally innocent, as in the case above, of a patent: 1 New Rep. 260. In the case before the court, the warrant turned out to be worth nothing, but neither party knew that when it was sold, and one had as good an opportunity of knowing it as the other. It was also proved that the defendant purchased the warrant of Lytle, so that it is clear, unless some other ingredient exist in this case than fraud, the plaintiff cannot recover. The case of *Gates v. Winslow*, 1 Mass. 65, if made to apply to personal contracts, has narrowed the responsibility of vendors, contrary to the late decisions in England, as will be seen presently. The case was, that the defendant had sold land to the plaintiff, for which he made a quit-claim deed; the title proved defective, and this action was brought to recover back the consideration paid. The court said that "where the parties were equally guilty, or equally innocent, *melior est conditio defendentis*, as no fraud nor imposition is pretended to have been practiced by the defendant, the court will presume that the parties, at the time of the transaction, were on equal grounds. Any one who had voluntarily given away a sum of money, might as well think of recovering it back as the plaintiff expect to maintain the present action," and so, says the book, where money has been paid voluntarily and understandingly, without fraud, imposition or deceit, although it were paid without consideration, the law will not compel a payment, but leaves the parties as it finds them. Strong, J., said "that a person who had purchased a lottery ticket, which happened to

come up a blank, might, with equal propriety, say that the contract was *nudum pactum*, and bring his action to recover back the price of the ticket."

The reasoning of this case is correct, if understood with relation to sales of real property, where there is no such thing as implied responsibility, or *quasi* contracts, as in the civil law.

By the law of England, which is believed to be our law in this respect, there is a settled and uniform distinction between the sales of real and personal property. In the first, a man is never liable in solemn contracts, but by express agreement, except a few cases of implied warranty, in exchange and partition excepted. [See *Chism v. Woods*, ante, 740.] In the other, he is often impliedly so. The reasoning in the case of *Gates v. Winslow*, must be referred to the class of cases respecting real property, as in *Bree v. Holbech*, Doug. 655.

The implied agreement in *Gates v. Winslow*, was clearly that the defendant should not be answerable, and no action can be sustained for money had and received, contrary to the express or implied agreement of the parties. In the cases hitherto reviewed, nor in the principles contained in them, have we been able to discover any which would authorize a recovery in this action. All the cases prove that it is not the mere circumstance of the consideration failing that will entitle the plaintiff to recover; another important ingredient is necessary, that the defendant cannot retain the money consistently with equity and good conscience. Can the defendant do so in the principal case? Without some principle of positive law, he certainly can. He having purchased the warrant, sold it again fairly, without fraud, concealment or misrepresentation, the defendant having as complete an opportunity of knowing every thing respecting it as the plaintiff had. Both parties equally knew that it was to be laid before the board for adjudication, when it might be condemned or not.

Is there, then, any principle in the law which will enable the plaintiff to obtain a recovery? It seems to me that there is. The principle alluded to is laid down by Holt, C. J., in the case of *Medina v. Stoughton*, 1 Salk. 210; 1 Ld. Ray. 593. Referred to in *Carthew*, 90; *Pasley v. Freeman*, 8 T. R. 57. "Where the seller has the possession of goods, the bare affirming them to be his makes a warranty."

The remark of Mr. Justice Buller, in the case of *Pasley v. Freeman*, that this rule more strongly applies where the seller is out of possession, does not come into view in the principal

case. But such implied warranty does not extend to the quality of the thing sold, and to charge a defendant on this ground he must know of a defect not known to the plaintiff, and which he could not know by the exertion of common prudence; and upon this principle it would seem, if goods should turn out to be the property of another, of which the seller was ignorant, it shall be no excuse; he will be liable. Property may be in action as well as in possession; if a person sells a covenant or bond, affirming it to be his own, the case of *Medina v. Stoughton* applies; he virtually warrants that it is so. Lord Holt is here speaking of property in possession; the same principle applies to that in action, where the law allows of its transference. The plain sense of the principle is, that the buyer should get something; that it should be in reality what it is said to be, which would be, as respects transferable choses in action, a warranty that the bond or obligation evidenced, at the time of its sale, a *bona fide* subsisting demand, as in the case of a forged bank-bill: *Markle v. Hatfield, ante*, 446. "The sale of a subject as existing which does not exist, is void; the vendor cannot deliver a *non ens*, and the purchaser is not bound to pay the price unless he gets what he bargained for." These observations are applicable to the common case of the assignment of a covenant from one man to another, and it is conceived that the assignee, standing in the shoes of the assignor, is subject to all the objections which could excuse the performance of the covenant if in the hands of the obligee; yet upon the sale, an implied warranty will render the seller liable if the covenant be avoided or rendered of no effect, for or on the ground of any objections attached to the original transaction, or existing respecting the covenant, previously to the sale; but the seller would not be liable for any subsequent events, rendering the covenant fruitless. Such events, the obligee, had he retained and not sold the obligation, would have been subject to; and such events the vendee would have as good a chance of knowing as the vendor. The buyer purchases nothing but the right, and assumes the risk of solvency of the obligee. It is admitted that there exists no difference between the case of an assignment of a warrant and a common unnegotiable bond.

Our next view is, the proceeding of the board of commissioners in declaring the warrant or obligation invalid. The state of Tennessee, by a cession from North Carolina (1804, c. 14), acquired the right of perfecting titles on *bona fide* land claims. In order, therefore, to ascertain these *bona fide* land

claims, the board was established; the board authorized to distinguish those that were *bona fide* and fairly obtained from the state, from those that were not, and upon that ground to decide on them, and declare them valid or invalid: 1806, c. 1, s. 29, 86; 1807, c. 2. s. 1, 13. A warrant thus declared void, on account of fraud practiced on the state when obtained, makes it so *ab initio*. It would be void in the hands of the assignee who purchased it subject to the same objections, it would have been in the hands of the assignor; on account of fraud the warrant was in fact void when sold, though not declared so till afterwards; and thus it results that the buyer in fact did not get anything for his money when he parted with it. The consideration having failed upon the principle of implied warranty, he ought to recover it back in this action. The circumstance of Lytle's having assigned the warrant instead of the defendant, who really was the seller, produces no difference in this case. The assignment creates no kind of liability in the eye of the law; it is the receipt of the consideration that generates a *quasi contract*.

I am not unmindful that it is a principle of law and public policy that lawsuits should not be multiplied in any event, further than the dictates of justice would require; nay, public utility sometimes bars relief, when moral justice requires it: Kam. Pr. Eq. 404-410; but the same author says: "It is a great object in society to rectify the disorders of chance, and to preserve to every man, as much as possible, the fruits of his own industry."

HUMPHREYS, J. When the question was argued at the last term, I had no doubt that the plaintiff ought to recover, but as Judge Overton wished to advise, it stood over. Upon the sale of such a paper, the buyer takes upon himself the risk of solvency, but no further. Other circumstances respecting an un-negotiable paper must be supposed to rest in the knowledge of the obligee or seller. At all events, the buyer is not presumed to know anything of such circumstances.

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1. **VESTED CORPORATE RIGHTS.** — Rights legally vested in a corporation cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation. *Wales v. Stetson*, 39.
2. **ASSENT TO AN ACT OF INCORPORATION.**—Where an act of the legislature incorporated certain persons named, for the purpose of making a street, and subjected them to assessment by the corporation for the expenses of making such street, it was held that a person named in the act could not be bound unless he had assented thereto. *Ellis v. Marshall*, 49.
3. **STOCKHOLDER'S RIGHT TO NEW STOCK.** — A banking company was incorporated with power to create a capital stock not less than a given sum, nor greater than another sum; it commenced business with the smaller capital, and afterwards it was voted to increase the capital to the larger sum. Those who held stock in the capital first raised were held to be entitled to subscribe for and hold the new stock according to their respective shares. *Gray v. Portland Bank*, 156.
4. **DAMAGES FOR REFUSING TO RECEIVE SUBSCRIPTION.**—Where a corporation refused to permit a stockholder to subscribe for the stock to which he was so entitled, it is liable to an action for damages for such refusal, and the measure of damages in such action is the excess of the market value above the par value of the number of shares he was entitled to, with interest on such excess. *Id.*
5. **ADMISSIONS OF MEMBERS OF A CORPORATION.**—The admissions of individual members of a corporation, a party to the action, and which were not made in the exercise of any corporate duty, cannot be received in evidence. *Hartford Bank v. Hart*, 274.
6. **CORPORATE ACTS, HOW PERFORMED.**—Where the act incorporating an insurance company, provided that no losses should be settled and paid without the approbation of at least four of the directors, with the president or two assistants, or a plurality of them, the acceptance of an abandonment made by the insured for a total loss, will not be a valid corporate act, unless it appears to have been done at a board of directors constituted according to the act, for a corporate body can only act in the mode prescribed by the act of incorporation. *Beatty v. Marine Ins. Co.*, 401.

COVENANTS.

1. **ASSIGNMENT OF BREACHES.**—In actions of covenant, the general rule is, that breaches may be assigned by negating the words of the covenant; but when such general assignment does not amount to a breach, the breach must be specially assigned. Covenants that the grantor is seised, that he has a right to convey, are within this rule; but covenants for quiet enjoyment, and against incumbrances, are within the exception, as well as a covenant of warranty. *Marston v. Hobbs*, 61.
2. **ACTION ON COVENANT OF WARRANTY.**—A plaintiff is entitled to recover on a covenant of warranty, though he may have voluntarily yielded up his possession; provided the title to which he yielded be good, and paramount to that of his warrantor. *Hamilton v. Cutts*, 222.
3. **WHAT CONSIDERED AN INCUMBRANCE.**—A paramount right is an incumbrance within the meaning of a covenant in a conveyance of land, that the same is free from all incumbrances. *Prescott v. Trueman*, 246.
4. **ACTION ON COVENANT OF WARRANTY.**—The plaintiff in an action for breach of covenants for quiet enjoyment and warranty, must allege in his declaration that he was evicted by a person having the legal title. *Greenby v. Wilcocks*, 379.
5. **COVENANT OF SEISIN NOT ASSIGNABLE.**—If the grantor was not seised, the covenant of seisin is broken immediately, but no action can be brought by the grantee's assignee on such covenant against the grantor, because after the breach it is a chose in action, and, therefore, not assignable. *Id.*

See LEASE, 1.

CRIMINAL LAW.

1. **GOODS STOLEN IN ONE STATE CARRIED TO ANOTHER.**—An indictment will lie against the receiver of goods stolen in New Hampshire, and brought into this state. *Commonwealth v. Andrews*, 17.
2. **CONSPIRACY.**—A conspiracy to manufacture base and spurious indigo, with a fraudulent intent to sell the same as good and genuine indigo, is an indictable offense, although no sale be made in pursuance of such conspiracy. *Commonwealth v. Judd*, 54.
3. **INDICTMENT FOR NUISANCE, DEFECT IN.**—On an indictment for a nuisance for keeping fifty barrels of gunpowder near the dwelling-houses of divers good citizens, and near a certain public street, etc., it was held that the allegation, in this manner, did not necessarily import a nuisance, otherwise if it had been charged to have been negligently and improvidently kept. *People v. Sands*, 296.
4. **STYLE OF COURT IN CASE OF PERJURY.**—In an indictment for perjury, the style of the court before which the perjury is alleged to have been committed must be correctly set out. *State v. Street*, 682.

DAMAGES.

1. **MEASURE OF.**—Upon a breach of the covenant of seisin, the measure of damages is the consideration paid, and interest thereon. *Marston v. Hobbs*, 61.
2. **BREACH OF COVENANT OF WARRANTY.**—In an action upon a covenant

of warranty, the measure of damages is the value of the land at the time of the eviction. *Gore v. Brazier*, 182.

3. **BREACH OF COVENANT AGAINST INCUMBRANCES.**—In an action on a covenant against incumbrances, if the plaintiff has, at a fair price, extinguished the incumbrance, such price shall be the measure of damages; but if he has not removed the incumbrance he shall recover only nominal damages. *Prescott v. Trueman*, 246.
4. **DEFICIENCY—MEASURE OF DAMAGES.**—Where land is sold with warranty, and there is a deficiency in the quantity, the purchaser is entitled to compensation for such deficiency, the value being estimated at the time of the contract, and not at the time when the deficiency was discovered. *Nelson v. Matthews*, 620.
5. **SAME.**—If several adjoining tracts of land be sold for a gross sum, and no specification be made at the time of the contract of the quality or separate value of each parcel, and there be a deficiency in the quantity of each tract, the purchaser will be entitled to compensation for the deficiency, according to the average value of the whole tract, and not of the several tracts taken separately. *Id.*
6. **PENALTY, LIMIT OF RECOVERY.**—In an action upon a penal bond, the plaintiff cannot recover damages beyond the penalty. *Warden v. Nelson*, 691.
7. **DAMAGES ON FAILURE TO DELIVER PROPERTY.**—The value of any personal property at the time when it was to be delivered, with legal interest thereon, is the most equitable general rule for estimating the damages in case of a failure to deliver the property. *Pope v. Campbell*, 722.

See **CONTRACTS**, 17; **CORPORATIONS**, 4; **LIBEL**, 4, 5; **REAL ESTATE**, 14, 15; **SEDUCTION**, 1; **SHERIFFS**, 1.

DEEDS.

1. **MONUMENTS WHEN TO CONTROL.**—Land was conveyed by a deed which described it as measuring forty-five feet, and bounded by certain known and visible monuments; but the distance between the monuments was sixty-five feet. It was held that the purchaser should hold according to the monuments, and not by the measure as described. *Howe v. Bass*, 59.
2. **DELIVERY OF.**—A deed signed, sealed, acknowledged and delivered to the custody of a third person as the deed of the grantor, to be delivered over to the grantee, on some future event, takes effect presently as the deed of the grantor, the third person being a trustee of it for the grantee. *Wheelwright v. Wheelwright*, 66.
3. **SAME.**—If delivered to a third person as the writing or escrow of the grantor to be delivered on some future event, it is not the grantor's deed until the second delivery; and if possession of it be obtained by the grantee before the happening of the event, the grantor may generally avoid it by pleading *non est factum*. *Id.*
4. **WHEN A MORTGAGE.**—A bond conditioned to reconvey an estate, which had been conveyed by deed of the same date, on payment of a sum of money, is a defeasance of the deed, which will be considered as a mortgage. *Erskine v. Townsend*, 71.

5. **CONSIDERATION—ACTION TO RECOVER BACK.**—A grantor by bargain and sale, for a valuable consideration, sold land with warranty, the grantee to hold from the grantor's death. It was held that during the grantor's life no action would lie to recover back the consideration; although an action on the covenant would, after death of the grantor, if a title to the land were not made to the grantee or his heirs. *Wallis v. Wallis*, 210.
6. **COVENANT TO STAND SEISED.**—If such bargain and sale be made by a father to his son, a consideration of natural affection from the relation of the parties will be presumed in addition to the valuable consideration expressed in the deed; and it will be construed as a covenant of the grantor to stand seised to his own use during life, and after his death to the use of the grantee. *Id.*
7. **UNRECORDED DEED AS NOTICE.**—A deed of conveyance, though not acknowledged or registered, will be good against a second purchaser with notice, and this notice may be either express or implied. *Farnsworth v. Childs*, 249.
8. **SAME.**—Where a second *bona fide* purchaser had read a prior deed, but the grantee had neglected for two years to record it, and had permitted the grantor to remain in the open possession and occupation of the land, the first purchaser was held not entitled to relief, and the second entitled to claim the land. *Id.*
9. **ESCROW.**—Where the sheriff executed a deed for land sold at auction, and delivered it to the attorney of the plaintiff in the execution, to be by him delivered to the grantee as soon as the purchase-money should be paid; it was held to be an escrow, and that until the condition be performed the estate continued in the judgment-debtor. *Jackson v. Catlin*, 415.
10. **INTERPRETATION.**—Where a deed may inure in different ways, the grantee shall have his election which way to take it; and an exception in a deed is always to be taken most favorably for the grantee. *Jackson v. Hudson*, 500.
11. **AGREEMENT TO CONVEY.**—An instrument in the form of articles of agreement to convey, and concluding with a penalty for non-performance, though containing words of bargain and sale; or a conveyance in *presenti* to a party and his heirs, is no more than an agreement to convey. *Jackson v. Myers*, 504.
12. **INTENT TO CONTROL.**—The intent, when apparent and not repugnant to any rule of law, will control technical terms; for the intent, and not the words, is the essence of every agreement. *Id.*
13. **OPERATIVE WORDS.**—The words "for value received," in a deed, import a sufficient consideration to raise a use in the bargainee under the statute of uses; and the words "make over and grant," are sufficiently operative to convey lands by way of a use. *Jackson v. Alexander*, 517.

See EVIDENCE, 21.

DELIVERY.

See DEEDS, 2, 3, 9; PERSONAL PROPERTY, 1.

DESCENT.

MAXIM SEISINA FACIT STIPITEM.—The maxim *seisina facit stipitem* has never been adopted in Connecticut, but on the death of the ancestor, the descent is cast upon the heir without any reference to the seisin of such ancestor. *Hillhouse v. Chester*, 265.

DOWER.

1. **NONE IN MOMENTARY SEISIN.**—A father conveyed land to his four sons in fee, who on the same day mortgaged the same land to the father to secure the payment of a sum of money and the maintenance of the father during life; it was held that there was only an instantaneous seisin in the sons, and therefore the wife of one had no claim to dower in the land. *Holbrook v. Finney*, 243.
2. **BAR.**—A devise was made by a husband to his wife of certain articles of personal property and forty pounds in money, "in lieu and stead of every other claim and pretension to his estate." It not appearing that the wife had accepted this bequest in lieu of dower, it was held that it was no bar to her right to dower at law. *Larrabee v. Van Alstyne*, 333.

DURESS.

WHAT CONSTITUTES.—Menaces which induce a fear of life, of mayhem, or of imprisonment, may avoid a deed; but a menace to commit a battery, to burn a house, or spoil goods, is not sufficient. *Edwards v. Handley*, 745.

EASEMENTS.

1. **RIGHT OF WAY OVER ANOTHER'S LAND.**—Where a judgment-creditor levied on a part of the debtor's land, leaving the latter no passage from the remaining portion to the highway, the debtor has necessarily a right of way over the land levied upon. *Pernam v. Wead*, 43.
2. **EXTENT OF.**—Where a grant was made with a reservation of a right of egress and regress, or of fishing and fowling upon the land, this did not give the right of taking wood, grass, or anything appurtenant to the ownership of the soil. *Emans v. Turnbull*, 427.
3. **RIGHT OF FISHING—LIMITATION OF.**—A right of fishing in any water gives no right over the adjoining land, nor any right to erect huts on the shore for that purpose. *Cortelyou v. Van Brundt*, 439.
4. **PRESCRIPTIVE RIGHT.**—A right to erect a building on another's land can in no case be acquired by prescription which applies only to incorporeal hereditaments. *Id.*

EJECTMENT.

1. **DEFENDANT'S TITLE.**—Where the defendant in ejectment sets up an outstanding title, it must be a present, subsisting and operative title; otherwise it will be presumed that such title in a stranger has been extinguished. *Jackson v. Hudson*, 500.
2. **EVIDENCE OF POSSESSION.**—When the plaintiff in ejectment claims to recover on the ground of prior possession, that possession must be clearly and unequivocally proved. The payment of taxes and the execution of partition deeds are not evidence of an actual possession, though they may show a claim of title. *Jackson v. Myers*, 504.

See MESNE PROFITS, 1; MORTGAGES, 3.

EQUITY.

1. **EQUITABLE TITLE OF VENDEE PROTECTED AGAINST JUDGMENT.**—A contract for the purchase of land made *bona fide* for a valuable consideration vests the equitable interest in the vendee from the time of the execution of the contract, although the money is not then paid. A judgment obtained by a third person against the vendor between the making the contract and the payment of the money, during which the vendee was in possession, cannot defeat the equitable interest thus acquired, nor is it a lien on the land affecting the right of the vendee. *Hampson v. Edelen*, 530.
2. **IGNORANCE OF LAW NO GROUND FOR RELIEF.**—Ignorance of the law, as to the legal effect of accepting the bond of one partner for a simple contract debt due by the firm, is not a ground for relief in equity. *Williams v. Hodgson*, 563.
3. **PARTY BOUND TO DO EQUITY.**—It is a rule that he who seeks equity must do equity; and therefore, if a person having contracted for a lease upon certain stipulations, enters upon the land, and fails to perform the stipulations, he cannot compel a lease to be made to him, either by the original lessor or his assignee. *Jones v. Roberts*, 576.
4. **RELIEF IN EQUITY AGAINST JUDGMENT AT LAW.**—A court of equity cannot relieve against a judgment at law, merely on the ground that it was erroneous, and though the plaintiff at law was not entitled to recover, or not entitled in that form of action, and the judgment was obtained by default. To grant relief in such cases, there must be some suggestion of fraud or surprise, or some good reason assigned for the failure to make a defense at law. *Turpin v. Thomas*, 615.
5. **SPECIFIC PERFORMANCE, WHEN DENIED.**—Equity will not decree a specific performance of a contract obtained under unfair advantages or circumstances of hardship not amounting to legal duress. *Edwards v. Handley*, 745.
6. **WAIVER OF EQUITY.**—If a party having a good equitable defense to a contract, afterwards confirm the same, without fear or duress, and with full knowledge of his rights, it is a waiver of his equity. *Id.*
7. **EQUITABLE RELIEF DENIED.**—If a party to a suit at law neglect to move for a new trial therein, having a right and a fair opportunity to do so, he has no right to relief in equity. *Id.*
8. **CONVEYANCE, WHEN DENIED.**—Equity will not compel a party to receive a conveyance of land in lieu of damages, if the complainant cannot show a clear title, and although there be no other objection. *Id.*

See FRAUDULENT CONVEYANCES, 1, 2; MARRIAGE ARTICLES, 2.

ESCROW.

See DEEDS, 3, 9.

ESTOPPEL.

TITLE BY.—If one party agrees in writing with another that he shall own and hold a piece of land to him and his heirs, and delivers him possession, which possession is held and enjoyed beyond the memory of man, he is concluded from disputing the title. *Eman v. Turnbull*, 427.

EVIDENCE.

1. **BOOKS OF ACCOUNT.**—Shop books verified by the oath of the party, though not kept regularly in the manner of a day-book, may be given in evidence to the jury, who are to judge of their credit. *Cogswell v. Dolliver*, 45.
2. **OUSTER.**—In an action upon a covenant of warranty, parol evidence is inadmissible to show an ouster. *Hamilton v. Cutts*, 222.
3. **DEPOSIT OF LETTER IN POST-OFFICE NOTICE TO PARTY.**—Depositing a letter in the post-office is a fact from which the jury may infer that the person to whom it was addressed had notice of its contents. *Hartford Bank v. Hart*, 274.
4. **CONSIDERATION IN DEED.**—Where the consideration is recited in a deed, parol evidence is inadmissible showing that a different consideration than that expressed was intended. *Schemerhorn v. Vanderheyden*, 304.
5. **PROOF OF FOREIGN LAWS.**—The common law of a foreign country may be proved by respectable and intelligent witnesses, but foreign statutes cannot be proved by parol. *Kenny v. Clarkson*, 336.
6. **RECORD OF FORMER SUIT.**—In order that the record of a former suit should be received as conclusive evidence to any point, it should appear that such point was put in issue. Extrinsic evidence cannot be received showing that a particular matter, not in issue on the record, was submitted to the consideration of the jury. *Manny v. Harris*, 386.
7. **DECLARATIONS OF TESTATOR.**—Parol evidence of a testator's declarations made subsequent to the execution of the will, and shortly before his death, are not admissible to show that he executed the will through fear and duress. *Jackson v. Kniffen*, 390.
8. **PROMISSORY NOTE.**—A resident of Rhode Island gave his promissory note, dated in Massachusetts, to a person residing there, by which he promised to pay forty pounds in certain lands, at nine shillings per acre. Afterwards, the maker obtained his discharge under an insolvent act of Rhode Island, and removed to New York. He admitted to the representatives of the payee that he would not convey the land, and promised to settle the note. In an action brought against him for money lent and advanced, it was held that the note was admissible in evidence under the money counts, and as connected with the acknowledgment it was sufficient evidence of consideration. *Smith v. Smith*, 410.
9. **EVIDENCE OF USAGE.**—Evidence of a usage is inadmissible to explain the language of a deed not ambiguous or equivocal. *Cortelyou v. Van Brundt*, 439.
10. **SAME.**—Where, in an action of trespass, the defendant pleaded the general issue, and gave notice that he would offer in evidence a prescriptive right of fishing in the sea adjoining the *locus in quo*, and of using and occupying the shore for that purpose, he cannot give evidence of any prescriptive right to erect huts on the shore for the purpose of fishing, but such a custom should be pleaded or mentioned in the notice. *Id.*
11. **PAROL, INADMISSIBLE AGAINST RELEASE.**—Where a release was given, expressing a release of all demands, parol evidence is inadmissi-

- ble to show that a particular debt was not intended to be released. *Pierson v. Hooker*, 467.
12. **WHEN WILL ENTITLED TO BE READ.**—In order to entitle a will to be read in evidence without proof by the subscribing witnesses, it must be at least thirty years old, reckoned from the testator's death. *Jackson v. Blanshan*, 485.
 13. **AS TO QUANTITY OF LAND CONVEYED.**—Where a deed was executed and delivered conveying a certain number of acres of land, it was held that no parol evidence was admissible to show a mistake in the quantity mentioned in the deed; and that no action could be maintained for money had and received, to recover the money paid for the number of acres alleged to be deficient. *Howes v. Barker*, 526.
 14. **PROOF OF COPY OF WILL IN FOREIGN JURISDICTION.** — Where a will executed in Philadelphia was transmitted by the testator to Martinique, where it was deposited, according to the laws of that island, with a notary, it was held that a copy of the will made by the notary, whose signature was certified by the colonial officer of the island, was sufficiently authenticated. *De Sobry v. De Laistre*, 535.
 15. **ADMISSION OF LETTERS.**—The letters of a witness may be read in evidence, to impeach his credit as to what he had sworn to on examination under a commission, but not as evidence of any other facts. *Id.*
 16. **EVIDENCE TO CHARGE DEFENDANT IN ASSUMPSIT.**—If the plaintiff, in an action of *assumpsit*, files an account in court containing the item of his claim against the defendant, he is precluded from going into evidence to establish his claim in a manner different from that in which he has elected by his account to consider the defendant his debtor. *Id.*
 17. **PROOF OF FOREIGN LAWS.**—The laws of a foreign country are to be proved by evidence, and the court is to decide what is the proper evidence of such laws, and to judge of the applicability of such laws when proved to the case before the court; but such laws are matters of fact to be found by the jury. *Id.*
 18. **RECORDS OF FOREIGN NOTARY.**—The minutes of the proceedings of a foreign notary public in protesting a bill of exchange are to be considered as records by the courtesy of nations, and a copy of such minutes under the hand and notarial seal of the notary, is sufficient evidence of the protest of a foreign bill of exchange for non-acceptance. *Bryden v. Taylor*, 554.
 19. **TO CHARGE ONE AS PARTNER.** — Where a defendant proved that a person was frequently seen in the counting-house of the plaintiff, transacting business as a principal, and was generally supposed, believed and understood to be a partner in the house of the plaintiff, which was carried on in the name of the plaintiff only, it was held that the evidence was not sufficient to prove that such person was a partner of the plaintiff. *Id.*
 20. **ADMISSIONS OF COUNSEL.**—Admissions of counsel of certain facts in a special verdict taken at a former trial between the same parties in the same action, are not evidence in a new trial of the same cause. *Dorsey v. Gaseaway*, 557.
 21. **PROOF OF CONTENTS OF LOST DEED.** — Where a deed is lost, or is not in the power of a party to produce it, it is only necessary to show an exemplified copy, or to prove the contents of the deed. *Id.*

- 22. PROCEEDINGS IN CHANCERY.** — Proceedings in chancery, under an insolvent law, are not evidence in favor of the person who had obtained the benefit of that law, to prove an acknowledgment and admission by him on his application for the benefit of the law. A bill in chancery, with all the proceedings and decree thereon, cannot be read in evidence in an action between parties other than those named in the proceedings. An answer in chancery, made by the respondents from information derived from the present defendant, is not admissible in evidence; but the declarations of the defendant are admissible evidence, and a witness may refer to the answer to refresh his memory as to the declarations made to him by the defendant. *Id.*
- 23. IMPEACHING PATENT IN EJECTMENT.** — In an action of ejectment, evidence showing that a patent was irregularly obtained, cannot be admitted to impeach such patent. *Witherington v. McDonald*, 603.
- 24. ADMISSION OF PAROL.** — Evidence is not admissible to contradict a written agreement, nor to detract from or add to any part of the contract, within the view of the parties, but parol evidence is admissible relative to a collateral matter to the contract. So, if on the sale of a slave, a bill of sale be given warranting the title, in an action brought for a defect in the health of the slave, parol evidence may be admitted showing unsoundness at the time of the sale, and that it was known to the vendor and concealed by him. *McFarlane v. Moore*, 752.
- See FOREIGN JUDGMENTS, 1; PROMISE OF MARRIAGE, 1; SLANDER, 1, 2, 3, 10; TRUSTS, 2.

EXECUTIONS.

- 1. CORN GROWING CONSIDERED A CHATTEL.**—Wheat or corn growing is considered a chattel, and as such may be taken in execution. *Whipple v. Foot*, 442.
- 2. LEVY ON GROWING CROPS.**—To make a valid levy of an execution on growing crops, it is not necessary that a manual possession should be taken, and it is sufficient merely to declare that the subject is levied on under the execution. *Id.*

EXECUTORS AND ADMINISTRATORS.

- 1. FOREIGN ADMINISTRATORS.**—An administrator who has taken letters of administration under the authority of one state, is not entitled to prosecute or defend an action in the courts of another state by virtue of such letters of administration. *Goodwin v. Jones*, 173.
- 2. SAME.**—Letters of administration granted under the authority of one state, are of no validity to give a right of action to the administrator in another state. *Riley v. Riley*, 260.
- 3. ASSETS, ADMINISTRATION OF.**—Any fund of a deceased person in the hands of his ancillary executor in a state, is liable to all creditors, without reference to their citizenship or residence, according to the laws of the state where the executor acts, and any surplus which remains in the hands of an ancillary executor after payment of creditors, goes into the mass of the estate, to be distributed according to the laws of the country where the testator was domiciled. *De Sobry v. De Laistre*, 535.
- 4. PROMISE BY EXECUTOR NO BAR TO ACT OF LIMITATIONS.** — On the

trial of an issue on the *assumpsit* of the testator within five years, repeated promises by the executor cannot be given in evidence, to prevent the operation of the act of limitations. *Fisher v. Duncan*, 605.

FEMES COVERT.

See ACKNOWLEDGMENT, 1.

FOREIGN JUDGMENTS.

RECORDS OF FOREIGN JUDGMENT.—Where a copy of a record of a judgment in Martinique was authenticated by the signature and seal of office of the grand judge of the island and colony of Martinique, it was held that parol evidence was admissible to prove the signature and seal of office of such judge, and that he had sole authority by the laws of the island to authenticate judicial proceedings. A seal of a foreign court does not prove itself, but must be proved by testimony. Where an official copy of a foreign judgment is produced, it is to be presumed that it is a full copy. *De Sobry v. De Laistre*, 535.

FRAUD.

See GRANT, 5, 6.

FRAUDULENT CONVEYANCES.

1. **LIMITATION OF RULE, POTIOR EST CONditio DEFENDENTIS.**—Where a creditor had availed himself of his power over the debtor, and by misrepresentation induced him to unite in a fraudulent conveyance to him of certain property, it was held that a court of equity ought to take cognizance of the situation of the debtor, as not being so culpable as the creditor, and apportion the relief granted to the degree of criminality in both parties. *Austin v. Winston*, 583.
2. **RELIEF REFUSED TO PARTY TO FRAUD.**—A debtor, while a suit was pending against him, in order to defeat a recovery that might be had against him in that suit, conveyed his property by an absolute deed, purporting to be for a valuable consideration. An agreement was made at the same time that the party should reconvey the property whenever requested. A recovery against the debtor not being had, he then filed a bill to compel the party to whom he conveyed, to reconvey according to his agreement. It was held that equity would not enforce this agreement on account of its moral turpitude. *Jackson v. Marshall*, 695.

GIFTS.

1. **REQUISITE OF GIFT INTER VIVOS.**—To constitute a valid gift, there must be an immediate delivery of possession of the thing given to the donee, or what is equivalent to actual delivery, as the delivery of a key, or some such means of obtaining the use and command of the subject. *Noble v. Smith*, 399.
2. **GIFT NOT COMPLETE.**—Where a person told another he gave the latter the corn growing in a certain field belonging to him, it was not sufficient without a delivery to the donee; and if the latter afterwards,

when the corn is ripe, enter the field and cut and carry away the corn, he will be considered a trespasser. *Id.*

GRANTS.

1. **LIMITATION OF FISHERY GRANT.**—A grant of a dam and a weir upon a river, with the exclusive right to take fish from the river below the dam, is held under the limitation that a sufficient and reasonable passage-way shall be allowed for the fish in their passage up the river; and this limitation being a public right, is not extinguished by any inattention or neglect in compelling the owner to comply with it. *Stoughton v. Baker*, 236.
2. **GOVERNMENT TO PROTECT SUCH PUBLIC RIGHT.** — The government may compel the private owners of dams to allow this free passage as a public right, but any injury suffered by the private owners in consequence of such interference may be compensated for by an action at law. *Id.*
3. **LIABILITY AND AUTHORITY OF LEGISLATIVE COMMITTEE.** — A committee appointed to make alterations, under their direction, of a private fishery grant, are not personally liable to those whom they employ, and as the exercise of their authority is personal, such authority cannot be delegated even to one of their own number. *Id.*
4. **IMPEACHMENT OF GRANT FROM STATE.**—At law, parol evidence is admissible showing that the officers of the state have issued a grant for lands forbidden by law to be entered and granted, and that such grant is therefore void. But where a grant has irregularly issued, the party wishing to avoid it must have recourse to a court of equity. *Strother v. Cathey*, 683.
5. **IMPEACHMENT FOR FRAUD.**—In ejectment between adverse claimants of land, evidence is not admissible to show that the grant upon which the interest of one of the parties depends was obtained by fraud. *Smith v. Winton*, 755.
6. **IMPEACHMENT.**—A subsequent grantee cannot avoid a prior grant on account of fraud practiced on the state in obtaining it. *Dodson v. Cocke*, 757.
7. **PRESUMPTIONS AFTER GRANT ISSUES.**—It will be presumed that after a grant has issued, it has been regularly obtained, and the entry is conclusive evidence of the payment of the consideration. *Id.*

See REAL ESTATE, 4, 5.

HIGHWAYS.

1. **TURNPIKE-GATE OBSTRUCTING PUBLIC.**—The proprietors of a turnpike road have no authority to erect a gate upon an existing public highway, unless specially authorized by the legislature. *Wales v. Stetson*, 39.
2. **TITLE IN.**—The grant or laying out of a highway gives only a right of way to the public; but the fee or right of soil remains in the owner, and an action of trespass will lie for any exclusive appropriation of the soil. *Cortelyou v. Van Brundt*, 439.

HUSBAND AND WIFE.

1. **POWER OF HUSBAND OVER WIFE'S PROPERTY.**—A husband dying in the lifetime of his wife has no right to dispose of slaves by will, to which she is entitled in remainder or reversion, the particular estate not having expired; though he may, in his lifetime, sell his and her interest in them for a valuable consideration. *Upshaw v. Upshaw*, 632.
2. **ELECTION BY WIFE UNDER HUSBAND'S WILL.**—Where the husband made a devise of slaves to other parties, in which his wife had a remainder, and a devise of other property to herself for life, with remainder over to others in fee simple, and she took possession of the estate devised to her, held it for many years, and then disposed of part of it to those entitled in remainder in consideration of their enlarging her interest in the residue to a fee simple, she thereby makes her election to accept the provision made for her in the will, and precludes her from also holding the slaves; these circumstances, together with her taking possession of property, being sufficient evidence of her having such knowledge of the two funds, so as to make her election obligatory. *Id.*

See MARRIAGE SETTLEMENTS, 4.

INSURANCE—FIRE.

1. **ALIENATION OF PROPERTY INSURED.**—A conveyance of an undivided half of the property insured, with a reservation of a term of seven years therein, and a reconveyance in mortgage of such half, is not such an alienation as will prevent a recovery for a loss occurring within the seven years, although the insured had also leased the premises for the same period. *Stetson v. Mass. Fire Ins. Co.*, 217.
2. **ALTERATION OF BUILDING.**—An insured represented at the time of application for insurance, that the building was connected with other buildings on one side only, but before the loss happened it became connected on two sides; the policy was not thereby avoided, unless the jury find that the risk was increased, because there was nothing in the policy rendering the same void by any mere alteration. *Id.*

INSURANCE—MARINE.

1. **RECOVERY FOR A PARTIAL LOSS.**—A vessel was insured from Spain to Teneriffe, and thence to Jamaica; she was captured during the voyage by a French corvette, but retaken by a British privateer and carried into Antigua, and there libeled in admiralty, which decreed a restoration, on payment of one-half the value as salvage; but upon the representation of the master, a part owner, that he was unable to pay the salvage, the court ordered the vessel sold. The master became the purchaser, and on his return delivered the vessel to the former owners. The insured then offered to abandon to the insurers the proceeds of the sale at Antigua, but refused to abandon the ship; but the underwriters refused to accept this abandonment. It was held that the insured were entitled to recover only for a partial loss. *Oliver v. Newburyport Ins. Co.*, 77.
2. **INSURABLE INTEREST.**—A part owner of a vessel, who has chartered the remaining portion, with a covenant to pay the value in case of a loss, may insure the whole vessel as his property. *Oliver v. Greene*, 96.

3. **TOTAL LOSS, WHEN DETERMINED.**—An insurance was effected upon a ship and freight, from Boston to one or more ports beyond the Cape of Good Hope, and at and from thence to a port of discharge in Europe or in the United States. On her return, within three days' sail of Lisbon the vessel was captured by a British frigate, carried to Bermudas, and libeled in the admiralty court as prize. When the insured had notice of the capture, and while the vessel was detained, he made an abandonment to the insurers, who refused to accept. The ship and cargo were afterwards restored and arrived safely in New York, where the cargo was landed in good order. The insured was held entitled to recover for a total loss of the ship and freight; the fact of the total loss to be determined at the time of the abandonment, and not by subsequent events. *Lee v. Boardman*, 134.
4. **WHEN POLICY ATTACHES.**—A policy was effected on a ship, cargo and freight, each being distinctly valued, at and from Calcutta to a port of discharge in the United States. At the time the policy was taken, the insured represented that the ship was at Calcutta in July, and would probably sail in August. She sailed in August; but proving leaky as soon as she went to sea, and the leaks continuing, she returned to Calcutta, and relanded her cargo; and upon a survey it was found that the leak arose from causes existing at the time the cargo was put on board, and that she was not seaworthy at the time of her sailing. She was then thoroughly repaired, the cargo reladen, and sailed again the following February, arriving home in safety. In an action for the premium it was held that the policy attached on the vessel, cargo and freight, while in port, and before the sailing in August; and that the insurers continued liable after her return to port, and during the subsequent homeward voyage, and therefore they had a right to the premium. *Taylor v. Lowell*, 141.
5. **WARRANTY OF OWNERSHIP.**—A policy of insurance was effected on goods from New York to France, warranted as American property. The goods were purchased and shipped in an American vessel, by American merchants to French merchants, under an agreement that the former were to deliver the goods at St. Vallery, for which they were to be allowed a certain commission, taking on themselves all risks; the consignees were to pay the freight on delivery, and also for the amount of cargo, in bills on London, guaranteed by a commercial house in that city. During the voyage, the goods were captured by the British, and condemned as French property. It was held that the property of the goods remained in the consignors until delivery in France, and that the warranty in the policy was not broken in regard to the neutral character of the property, so as to vitiate the policy. *Ludlow v. Bowne*, 277.
6. **WHAT CONSIDERED A LOSS.**—Insurance was effected on the cargo of a vessel at and from New York to a port or ports in the island of Cuba, thence back to New York. The policy contained the usual clause to be free from any loss arising in consequence of illicit trade, etc. The vessel arrived at her port of destination, but was not allowed entrance, and after waiting twenty days, sailed for another port in the island; meeting on the way adverse winds, she was compelled to put into a port of safety, but fearing pirates, then she went to Port Republican,

in St. Domingo, where the cargo was forcibly taken out, and disposed of at great loss. On receiving advice of this circumstance, the insured abandoned for a total loss, and in their letter assigned as a cause that the vessel had been refused entry at her port of destination, and the voyage was therefore defeated. It was held that the denial of entry was not a loss within the policy. *Suydam v. Marine Ins. Co.*, 307.

7. **WHEN ABANDONMENT MADE, CAUSE TO BE ASSIGNED.**—When the insured makes an abandonment, he must assign the true cause. If he assign an insufficient cause, he is bound by it, and cannot take advantage of a subsequent event, without a new abandonment. *Id.*
8. **A BLOCKADE A PERIL WITHIN A POLICY.**—If the port of destination be actually blockaded, the insured may abandon as for a total loss. The interdiction of commerce by means of the blockade is a peril within the policy; and going to another port subsequently to deliver the goods, will be considered, after the abandonment, as done for the benefit of the insurer. The acceptance of the goods at another port by the consignee, under such circumstances, is for the advantage of all concerned, and will not prevent a recovery for a total loss on the abandonment. *Schmidt v. United Ins. Co.*, 319.
9. **INSURABLE INTEREST.**—A British vessel was purchased from merchants in Jamaica, but the purchaser being unable to pay the entire purchase-money, it was agreed that she should remain in the name of the original owners, until the balance was paid, when they should give a regular bill of sale. The purchaser took possession, and appeared as owner of the vessel. In an action on a policy of insurance effected on the vessel in the name of the purchaser, it was held that he had an insurable interest. *Kenny v. Clarkson*, 336.
10. **RIGHT TO INSURE WHEN BOTTOMRY BOND EXISTS.**—The owner, although there be a bottomry bond on the vessel, may insure his interest generally, but the holder of a bottomry bond must specially insure his interest. *Id.*
11. **PRESUMPTION OF UNSEAWORTHINESS.**—A vessel sailed with a fair wind and moderate weather, and in the evening of the same day suddenly sprung a leak, in consequence of which she foundered without any apparent cause or extraordinary accident to account for the leak. It was held in an action on the policy, that the loss would be presumed to have arisen from her unseaworthiness at the time of sailing, and therefore the insured could not recover. *Talcot v. Commercial Ins. Co.*, 406.
12. **INSURABLE INTEREST.**—A vessel was chartered for a voyage from New York to Jeremie and return, the charterer paying sixteen hundred and fifty dollars within sixty days after arrival at Jeremie, and eight hundred dollars on the delivery of the return cargo. The charterer insured freight for eighteen hundred dollars, being "two-thirds the value of the freight," on a voyage "from Jeremie to New York, upon the freight of goods laden or to be laden," etc. The vessel having been captured on her return voyage, and condemned, it was held that the charterer had not an insurable interest; for the policy being on freight generally, it could not be considered as on freight earned. *Cheriot v. Barker*, 437.
13. **POLICY WHEN EXPLICIT MUST CONTROL.**—Where the terms of a

policy are clear and explicit, the court will not hear any suggestion or proof of mistake, as that an insurance on freight generally was intended to cover freight earned. *Id.*

14. **RIGHT TO ABANDON.**—A policy was made on freight from New York to Barcelona. The vessel, while proceeding out of the harbor on the voyage insured, was stranded, and the cargo, consisting of flour, was so damaged that it would not be worth the freight to carry it to its place of destination. Information was given to the insurers at the time of the accident, and two days afterwards the insured abandoned as for a total loss. The vessel was repaired in seventeen days, enabling her to prosecute the voyage, at an expense of one hundred and fifty dollars. The cargo, which was insured by others, had also been abandoned and accepted by the insurers, and sold at auction at a loss of about twenty-seven per cent. It was held that the insured on the freight had no right to abandon, but should have offered to the owners of the cargo to carry it to its place of destination, so as to entitle them to the freight. *Griswold v. N. Y. Ins. Co.*, 490.
15. **DEVIATION.**—A vessel was insured from New York to Bordeaux, and had French passengers on board; and the owners instructed the master to proceed through the Sound, so as to avoid the risk of detention by British cruisers then off Sandy Hook. The master accordingly went through the Sound, instead of going through the Narrows, the ordinary and least dangerous route for vessels. This was held to be no deviation. *Reade v. Commercial Ins. Co.*, 495.
16. **LIABILITY OF INSURERS TO PAY BOTTOMRY BOND.**—A vessel being insured from New York to Bordeaux, was consigned, with a part of the cargo belonging to the owner, to a person at Bordeaux, on whom bills were drawn to the full amount of the goods and freight. The master applied to the consignee there to make necessary repairs for the return voyage, and the consignee made an advance of money, taking a bottomry bond for the amount. It was held that the insurers, under the circumstances of the case, were not bound to pay the bottomry bond, but only for the repairs. *Id.*
17. **LIABILITY FOR FREIGHT.**—If the owner of a ship and cargo abandon to the insurers as for a total loss by perils of the sea, and part of the goods be saved, the insurers are liable for the freight *pro rata* to the owner. *Teasdale v. Charleston Ins. Co.*, 705.
18. **NOTICE OF ABANDONMENT.**—Reasonable notice of an intention to abandon must be given to the insurers after the receipt of information justifying an abandonment; if not, the right of abandonment will be forfeited. *Id.*
19. **TIME OF ABANDONMENT.**—The insured has no right to wait to ascertain the extent of the loss on the sale of damaged property before making the abandonment; for the right to abandon cannot depend upon events subsequent to the peril. *Id.*
20. **INSURERS' LIABILITY.**—The insurers are not liable for remote or consequential damages, nor for the neglect of the master when he acts directly under the insured. *Id.*

JUDGMENTS.

OF ANOTHER STATE, VALIDITY OF.—If the judgment of another state

be founded upon the appearance of the defendant, or service of process be actually made upon him, such judgment is conclusive, except so far only as it could be impeached in the courts of the state where it was rendered. But where the defendant did not appear, and had constructive notice only, as by attachment or publication, the judgment is not conclusive, but may be inquired into and impeached. *Rogers v. Coleman*, 733.

See ASSIGNMENT, 2; EQUITY, 1, 4.

JURY.

See STATUTE OF LIMITATIONS, 8.

LEASE.

1. **BREACH OF COVENANT.**—A lease contained the covenant that “in case the lessee should suffer or permit more than one family to every hundred acres, to reside on, use or occupy any part of the premises, the lease should be void,” etc. It was held that letting parts of the premises to persons for a year to cultivate for shares, constituted such persons tenants; and there being more than one such tenant to each hundred acres, the lease became thereby void. Persons occupying the land in this manner have an interest in the land, and are not mere laborers or servants of the lessee. *Jackson v. Brownell*, 326.
2. **DESTRUCTION OF LEASED PREMISES.**—In an action for rent due on a lease, it was held that the destruction of the demised premises by fire did not excuse the payment of rent by the lessee, according to his covenant. *Hallett v. Wylie*, 457.

LEGISLATURE.

1. **FREEDOM OF DEBATE IN LEGISLATIVE BODIES.**—The freedom of deliberation, speech and debate assured by the constitution to each branch of the legislature, is particularly the privilege of the individual member rather than of the house as an organized body; and being derived from the will of the people, the members are entitled to this privilege, even against the will of the house. *Coffin v. Coffin*, 189.
2. **SAME.**—The constitutional provision securing such freedom should be construed liberally, so its full design may be answered; thus extending it to every act resulting from the nature of the member's office, and done in the execution of it, and exempting him from a liability for everything said or done by him as a representative, whether according to the rules of the house or not. *Id.*

LIBEL.

1. **JUSTIFICATION.**—In a criminal prosecution for a libel the truth is no justification; but the defendant may show the purpose of the publication to have been justifiable, and then give the truth in evidence to negative the malice and intent to defame. *Commonwealth v. Clap*, 212.
2. **ON PUBLIC OFFICERS.**—Publications of the truth regarding the character of a public elective officer, and referring to his qualifications for such office, made with intent to inform the people, are not libelous. *Id.*

3. **SAME, WHEN LIBELOUS.**—Because of the important public interests involved in the election of public officers, the publication of falsehood and calumny against public officers and candidates for public office is a very high offense. *Id.*
4. **MITIGATION OF DAMAGES.**—Judgment by default was taken in an action for libel, and a writ of inquiry to assess damages was had before the court. A motion being made to set aside the assessment of damages for misdirection of the judge, it was held that by the interlocutory judgment, the fact of publication, and the truth of the *innuendoes* were admitted, and that the defendant could not have the attention of the jury called to other paragraphs of the publication, showing a different meaning of the libelous words, nor could he offer in evidence in mitigation of damages the recovery of damages in favor of the plaintiff against the defendant in another action for a libel published in one of a series of numbers published in the same paper, and which contained the same libelous words as were charged in the present suit. *Tillotson v. Cheetham*, 459.
5. **EXEMPLARY DAMAGES.**—The jury in assessing damages in an action for libel may properly take into consideration the position of the plaintiff, and his character as a public officer, with the view of giving exemplary damages.

MANDAMUS.

1. **WHO ENTITLED TO.**—The writ of *mandamus* is the proper remedy to restore a clerk of a court ousted from his office by the illegal appointment of another person. *Dew v. Judges*, 639.
2. **PARTIES TO WRIT.**—The person occupying the office ought to be made a party to the rule, or to the conditional *mandamus*, or such rule or *mandamus* ought to be served upon him, so as to enable him to defend his right before the peremptory *mandamus* issues; but if it appear from the record that he was apprised of the proceedings and defended his right, it is sufficient. *Id.*
3. **PROCEEDINGS ON WRIT.**—If the original rule be to show cause why a *mandamus* should not issue to admit the clerk, the subsequent rule, or the *mandamus* founded thereon, may nevertheless be to restore him to the said office; for such rules may be changed and modified so as to conform to the rights of the parties, and promote the justice of the case. *Id.*

MARRIAGE ARTICLES.

1. **NATURE OF.**—Marriage articles are to be taken only as the heads or minutes of an agreement entered into between the parties, upon a valuable consideration, and being in their nature executory, ought to be construed and moulded, in equity, according to the intention of the parties. *Tabb v. Archer*, 657.
2. **INTEREST OF ISSUE.**—Children of the marriage are considered as purchasers by virtue of marriage articles; and after marriage, their rights cannot be affected by either of the parties to the articles; a court of equity will interfere in the behalf of those for whose benefit the articles were made. *Id.*
3. **CONSTRUCTION.**—The intention of the parties in marriage articles should

be collected from the nature of the agreement, the language and context, the usage in such cases, and the legal rights of the parties, as they existed before, and would have existed after the marriage if no agreement had been made; parol evidence cannot be resorted to, unless there be some latent ambiguity, or unless there is some omission through fraud or accident. *Id.*

4. **RIGHTS UNDER.**—The husband should not be deprived of any of his legal rights, except such as he must be understood and intended to have given up; and the same construction ought to be made in relation to the wife's legal rights, either accruing on the marriage, or existing antecedent thereto, and independent of it. *Id.*
5. **CONSTRUCTION OF PARTICULAR AGREEMENT.**—It having been agreed by marriage articles that all the estate, real and personal, of the wife should remain in her right and possession during the marriage, and the profits only to go to the support of the husband and wife, and issue, if any; and further, that the husband would never sell or dispose of any part of the estate, but that it should always be held as an inviolable fund, for their support and that of their issue, the first clause was construed as containing a declaration of the uses of the estate during the coverture only, and the second as declaring the uses afterwards. The husband, therefore, as well as the wife, was held entitled to the benefit of these uses for life. *Id.*

MESNE PROFITS.

RECOVERY OF, AFTER EJECTMENT. — After a recovery in ejectment by default, against the casual ejector, the lessor of the plaintiff may maintain trespass for the mesne profits against the tenant, and may recover costs in the action of ejectment; and the defendant cannot offer any evidence against the demands of the plaintiff, which he could have set up in the original action. *Baron v. Abeel*, 515.

MORTGAGES.

1. **ENTRY BY MORTGAGEE.**—A mortgagee in fee may enter immediately on the execution of the mortgage, eject the mortgagor, and receive the profits, there being no agreement to the contrary; when the mortgagor refuses to give possession, the mortgagee may maintain trespass against him, or recover against him as a disseisor. *Newall v. Wright*, 98.
2. **MERGER.**—A loan was secured by mortgage to be paid in five years, interest payable annually; at the same time a lease was made of the same premises by the mortgagor to the mortgagee for the same period, reserving rent. It will be presumed that the mortgage was first executed, and such mortgage does not bar a recovery of the rent due on the lease. *Id.*
3. **RIGHT OF MORTGAGOR TO MAINTAIN EJECTMENT.** — A mortgagor cannot maintain ejectment for the land mortgaged, unless he can show that the mortgage has been satisfied previous to the commencement of the suit. *Beall v. Harwood*, 532.
4. **WHAT CONSIDERED A MORTGAGE.**—No particular words or form of conveyance are necessary to give the contract the qualities of a mortgage.

It may be laid down as a general rule, subject to few exceptions, that wherever a conveyance or assignment of an estate is originally intended as a security for money, whether this intention appear from the deed itself, or any other instrument, it is always considered, in equity, as a mortgage. *Wilcox v. Morris*, 678.

See DEEDS, 4; PAYMENT, 3.

NECESSARIES.

See PARENT AND CHILD, 3.

NEGOTIABLE INSTRUMENTS.

1. **SPECIAL INDORSEMENT.**—A payee of a note indorsed it specially thus: "For value received, I order the contents of this note to be paid to A. B. at his own risk." Such special indorsement transfers the property in the note without impairing its negotiable quality to the indorsee. *Rice v. Stearns*, 129.
2. **DEMAND OF PAYMENT WHEN EXCUSED.**—In an action by an indorsee against an indorser of a promissory note, the plaintiff is not bound to prove a demand on the promisor, where it appears that the latter had absconded before the maturity of the note. *Putnam v. Sullivan*, 206.
3. **FRAUDULENT ISSUE OF.**—Where a merchant had intrusted blank indorsements to his clerk, and one by false pretenses obtained and used them, such fraudulent use is not a forgery, nor such a fraud as will discharge the indorser, as against an innocent indorsee. *Id.*
4. **COLLATERAL AGREEMENT AFFECTING.**—Where the payee of a note payable at a certain date agreed, at the time the note was given, not to demand payment until a certain time after maturity, this is a collateral promise, for the breach of which, if a consideration appear, an action will lie, but it cannot bar an action on the note when it becomes due. *Dow v. Tuttle*, 226.
5. **DEFENSES AGAINST NOTE IN HANDS OF INDORSEE.**—Where an indorsee of a promissory note receives it under circumstances which might reasonably create suspicions that it was not good; as receiving it after payment has been refused, or some time after it is payable, or when the indorser is not to be liable on his indorsement; it will be subject, in the hands of the indorsee, to any legal defense which might be made against the payee. *Ayer v. Hutchins*, 232.
6. **PAYMENT BY NOTE.**—If a negotiable note or bill of exchange be given for a simple contract debt, the party cannot recover on the original contract, unless he proves the loss of the note, or produces and cancels it at the trial. *Holmes v. De Camp*, 293.
7. **NOTE TAKES EFFECT FROM DELIVERY.**—Notes delivered after the time on which they are dated are valid only from the day of delivery, and are to be considered as drawn on that day. *Lansing v. Gaine*, 422.
8. **DEFENSES AGAINST OVERDUE NOTE.**—Where a note is transferred after it has been dishonored, the holder takes it subject to all defenses against it in the hands of the original payee. *Id.*
9. **INDORSEMENT BY ONE NOT A PAYEE.**—Where a person, not a payee, indorsed his name in blank on a bill of exchange, without any consideration, and prior to its indorsement by the payee, it was held he

was not liable as an indorser, but otherwise if there had been a consideration for the indorsement. *Fitzhugh v. Love*, 568.

10. **RIGHTS OF HOLDER OF PROMISSORY NOTE.**—The holder of a promissory note payable to bearer, is not bound to prove that he came by the note fairly and for a valuable consideration, unless some evidence is given to raise a suspicion, at least, that he did not come fairly by the note. *Jones v. Westcott*, 704.

NEW TRIAL.

1. **WHEN DAMAGES EXCESSIVE.**—When the damages found by the jury, in an action of tort, are so great that it may reasonably be presumed that in estimating them the jury did not exercise a sound discretion, but were influenced by passion, partiality, prejudice, or corruption, the court may set aside the verdict and award a new trial. *Coffin v. Coffin*, 190.
2. **GROUND FOR.**—The rule, both at law and equity, is to refuse a second trial where the propriety of a verdict is not impeached as against law or evidence, though there be material evidence for the party against whom the verdict had passed which was not adduced; unless it be shown to have been discovered after the trial, or unless the verdict has been obtained by fraud or surprise. *Bebes v. Bank of N. Y.*, 353.
3. **SAME.**—In actions of a penal or vindictive nature, the court will not grant a new trial merely because the verdict is against the weight of evidence, unless some rule of law has been violated. *Jarvis v. Hatheway*, 473.
4. **SAME.**—The fact that the defendant in ejectment, against whom a verdict has been obtained, has, since the trial, discovered that the grant under which the plaintiff claimed was fraudulently obtained from the state, and that a prior grant had issued to a third person, is not sufficient ground for a new trial. *Smith v. Winton*, 755.

See CRIMINAL LAW, 3; EQUITY, 7.

PARENT AND CHILD.

1. **OBLIGATION OF FATHER FOR SUPPORT OF CHILD.**—Where an infant child escaped from its father through fear of personal violence and abuse, and could not safely live with him, the father was held liable for necessary support and education furnished to the child by a stranger. *Stanton v. Willson*, 256.
2. **SAME.**—Where the wife had obtained alimony, in lieu of all claims of dower, and was made sole guardian of the children, it was held the father was liable for their support, furnished in the first place by her as guardian, and then by a stranger with whom she intermarried. *Id.*
3. **WHAT ARE NECESSARIES.**—What articles are necessities must depend upon the circumstances of the party for whom they are furnished; and when these circumstances are ascertained, the court will only instruct the jury as to the classes of articles which are considered as necessities. *Id.*

PARTNERSHIP.

1. **SUIT BY FIRM AFTER A PARTNER'S DECEASE.**—Where a partner had

died, and the surviving partners had continued to trade under the firm name, and then an account between a debtor and the firm was stated, from which it appeared that a balance was due by the debtor for goods sold in the lifetime of the deceased partner; it was held that the surviving partners could recover this balance, without alleging the death of the other partner and the survivorship; as the stating of the account was in the nature of a new promise to the survivor. *Holmes v. De Camp*, 293.

2. NOTICE OF DISSOLUTION.—Notice of the dissolution of a partnership in a newspaper is sufficient notice to all persons having previous dealings with the firm. *Lansing v. Gaine*, 422.
3. POWER OF PARTNER AFTER DISSOLUTION.—Where a partner, after dissolution, issues notes in the name of the firm, the other partner is not liable thereon, for the power to bind the firm ceases with the partnership. *Id.*
4. SPECIAL POWER OF PARTNER.—When a partnership is formed for a special purpose, and is limited, and a partner gives the firm notes for his individual obligation, the other partner is not liable, if the notes are issued without his knowledge or consent, and the person receiving them is aware that they are not issued for a firm debt. *Id.*
5. RELEASE BY ONE PARTNER.—If one partner execute a deed of release under his hand and seal, in the firm name, of a debt due the firm, it extinguishes the debt, and the release is binding on the firm. *Pierson v. Hooker*, 467.
6. BOND BY ONE PARTNER FOR FIRM DEBT.—A bond given by one partner for a simple contract debt due to a creditor of the firm, and accepted by him, is in law a release of the other partner, and an extinction of the simple contract debt at law and in equity. *Williams v. Hodgson*, 563.
7. SAME.—Such a bond, although not binding on the party who does not join in its execution, is, however, obligatory on the one executing it. *Id.*

See EVIDENCE, 19.

PAYMENT.

1. LESS SUM NO ACCORD.—The payment of a less sum, though accepted in full, where there is a certain amount due, cannot be taken as a good accord and satisfaction. *Harrison v. Close*, 444.
2. FORGED BANK-BILLS.—The vendor sold and delivered cattle, and received payment in bank-notes, which he afterwards paid away to a third party, who discovered one of the notes to be forged. Neither the vendor nor vendee knew that the note was bad. In an action brought by the vendor against the vendee, on the original contract, for cattle sold and delivered, it was held that a forged note or bill which proves worthless is no payment, and that the party may treat it as a nullity, and resort to the original contract. *Markle v. Hatfield*, 446.
3. APPLICATION OF PAYMENTS.—Payments made by a mortgagor are not to be applied to discharge a debt due on the mortgage in favor of a purchaser of part of the property mortgaged, who had not paid for it,

and who had made a gift thereof to his son to defraud his creditors. *Dorsey v. Gassaway*, 557.

4. **PAYMENT OF PROPERTY, WHERE MADE.**—The residence of the debtor is the place where payment in property is to be made, where no other place is agreed upon. *Grant v. Groshon*, 725.

See **NEGOTIABLE INSTRUMENTS**, 2, 6.

PERJURY.

See **CRIMINAL LAW**, 4.

PERSONAL PROPERTY.

1. **WHEN RIGHT OF PROPERTY PASSES—DELIVERY.**—A party agreed to sell certain goods on credit, with the condition that the vendee should furnish security for the price; he delivered the goods, however, without this security, declaring that he should not consider them as sold until the security had been given. The property, it was held, remained in the vendor, notwithstanding the delivery. *Hussey v. Thornton*, 224.
2. **HOW DISTRIBUTED.**—The personal property of a testator is to be distributed according to the laws of the testator's domicile. *De Sobry v. De Laistre*, 535.
3. **POSSESSION AN INDICIUM OF OWNERSHIP.**—A father, when there was no statute of frauds, delivered certain slaves to his son, which by parol evidence alone were shown to have been loaned for an indefinite period, and the son having retained uninterrupted possession for many years, used the property as his own, acquiring credit by reason of such possession. In a controversy between the father, or volunteer claimants under him, and creditors of and purchasers from the son, the father shall be deemed to have given him the slaves, and on general principles of law and equity, independent of any statutory provision, the title of such creditors or purchasers will be protected; and the fact that the father afterwards, by his last will and testament, bequeathed the slaves to his son for life, remainder to his children, makes no difference in the case. *Fitzhugh v. Anderson*, 625.

See **DAMAGES**, 7; **EXECUTIONS**, 1, 2; **PAYMENT**, 4.

PLEADING AND PRACTICE.

1. **PLEADING A PROMISE.**—In a declaration in *assumpsit*, the word "promised" is not necessary; any other intelligible word of similar import, as, for instance, "agree," is sufficient. *Avery v. Tyringham*, 105.
2. **JOINT TRESPASS, RECOVERY.**—Where separate suits are brought against several defendants for a joint trespass, a separate recovery may be had against each; but the plaintiff can have but one satisfaction, and he may elect *de melioribus damnis*, and issue his execution therefor against one of the joint trespassers. *Livingston v. Bishop*, 330.
3. **EQUITABLE RELIEF UNDER GENERAL PRAYER.**—A party will not be denied relief by a court of equity merely because he is mistaken in the specific relief prayed for, but if his bill contains a prayer for general relief, the court will give the relief required by the facts of the case. *Bebes v. Bank of New York*, 353.

4. **PLEA OF PAYMENT, WHEN BAD.**—Where the defendant alleged in his plea, that on the statement of an account, he delivered certain negotiable notes to C. on account and in behalf of the plaintiffs, but did not aver that C. was the agent of the plaintiffs, nor that the notes were accepted in full satisfaction and discharge of the debt, the plea was held bad. *Bird v. Caritat*, 433.
5. **ISSUING WRIT, COMMENCEMENT OF ACTION.**—An allegation that prior to the suing out of the writ, the defendant settled and discharged the debt of the plaintiffs, is sufficient as to the time; for the suing out of the writ is considered as the commencement of the suit. *Id.*
6. **PLEADING FRAUD AND DECEIT.**—In an action on the case for deceit in the sale of a newspaper establishment, it was alleged that the defendants affirmed the number of subscribers to be nine hundred, and the profits to be three thousand dollars per annum, whereas, in fact, the number of subscribers was only six hundred, and the profits nothing, the declaration then concluded: "and so the said S. B. saith that he, by reason of the said affirmation of the said R. M. and S. M., was falsely and fraudulently deceived, to wit, the day and year aforesaid, at the city and county aforesaid. Wherefore, he saith he is made worse, and hath damage to the value of," etc. This was held to be a sufficient allegation that the defendants made the affirmations falsely and fraudulently, especially after verdict. *Bayard v. Malcolm*, 450.
7. **ASSUMPSIT OF TESTATOR.**—On the trial of an issue upon the *assumpsit* of the testator, evidence is not admissible showing a promise or engagement on behalf of the executor. *Quarles v. Littlepage*, 637.
8. **ADMISSION OF DEBT.**—The mere admission of a debt is not sufficient to charge the defendant with the whole demand of the plaintiff; he must, nevertheless, prove the amount due. *Id.*
9. **ALLEGING DEMAND AND REFUSAL.**—Where a debt is payable on a particular day, the plaintiff need not allege in his declaration, a demand and refusal at the residence of the defendant. If the defendant were really ready and willing to pay, he should specially plead it. *Grant v. Groshon*, 725.

PRINCIPAL AND AGENT.

DUTY OF AGENT TO INSURE.—An agent is bound to insure the goods of his principal, if so directed, after entering upon the agency. But if he is a special agent, and has no particular instructions, he is not bound or authorized to insure, unless there is a usage otherwise. *Shircliff v. Whitfield*, 701.

PROMISE OF MARRIAGE.

BREACH OF EVIDENCE OF PLAINTIFF'S CHARACTER.—In an action for a breach of promise of marriage and for seduction, the defendant cannot give evidence of the plaintiff's general bad character between the time of the promise and the breach, in mitigation of damages. *Boynston v. Kellogg*, 122.

QUESTIONS OF LAW AND FACT.

SUFFICIENCY OF EVIDENCE FOR JURY.—The sufficiency of the evidence ought to be left wholly to the consideration of the jury; so, where the

court instructed the jury that "from the whole testimony before them, the demand of the plaintiffs was not barred by the act of limitations," it was held that the instruction was erroneous. *Fisher v. Duncan*, 605.

See STATUTE OF LIMITATIONS, 8.

REAL ESTATE.

1. **OWNERSHIP OF ALLUVIAL LAND.**—Whatever addition is made to the shores of rivers or streams by alluvion, from natural causes, or from a union of natural and artificial causes, belongs to the riparian owners of the shores. *Adams v. Frothingham*, 151.
2. **EXTENT OF CLAIM UNDER ADVERSE TITLE.**—When one enters on land, claiming a right to it, and gains a seisin by such entry, the seisin shall extend to the whole tract which he claims; but when one enters without a claim of right, his seisin can extend no further than his actual possession. *Kennebec Purchase v. Springer*, 227.
3. **WHAT CONSTITUTES A DISSEISIN.**—To constitute a disseisin of the owner of uncultivated lands, the entry and possession of the disseisor must be such that the owner shall be presumed to know that there is a claim adverse to his title. *Id.*
4. **GRANT OF INHERITANCE IN TREES.**—A grant to one, his heirs and assigns, of all the trees and timber standing and growing on certain lands forever, with liberty to cut and carry them away, conveys an estate of inheritance in the trees and timber, and the grantee can maintain trespass *quare clausum fregit* against the owner of the soil for cutting down the trees. *Clap v. Draper*, 215.
5. **PRESUMPTION AS TO ANCIENT GRANT.**—An agreement relative to lands, which had existed for more than one hundred years, providing that it should be owned and held by the parties in parcels, and which was evidently intended to convey a fee, and where there has been under it uninterrupted possession, will not be technically construed, and a regular grant will be presumed. *Emans v. Turnbull*, 427.
6. **OWNERSHIP OF ACCRETION TO LAND.**—Sea-weed which has been thrown upon land by the sea is considered an accretion, and belongs to the owner of the soil. *Id.*
7. **POSSESSION BY INDIANS NOT ADVERSE.**—A possession by native Indians, existing as an independent nation, is not such an adverse possession as will render void alienations by patentees to whom the lands were granted by the state, and cannot be set up against the validity of the patent, or conveyances under it. *Jackson v. Hudson*, 500.
8. **WHEN LIFE ESTATE CREATED.**—A bargain and sale of land to A., "to hold the same for A. in trust for B. and C., their respective heirs and assigns forever in fee-simple," creates only a life estate in A., and at his death the legal estate reverts to the heirs of the grantor, and B. and C. can resort only to a court of equity to have the trust enforced. *Jackson v. Myers*, 504.
9. **CONVEYANCE BY FEME COVERT.**—A *feme covert* cannot transfer her interest in land unless by fine, common recovery, or deed, executed and acknowledged according to the mode prescribed by statute. *Hollingsworth v. McDonald*, 545.
10. **WORDS NECESSARY TO CREATE PARTICULAR ESTATES.**—In a con-

veyance of a freehold or legal estate, technical words are necessary for the creation or limitation of particular estates, as to create an estate in fee, the limitation must be to the grantee and his heirs, and to create a fee-tail to him and the heirs of his body, but the latter words are not indispensably necessary, but may be supplied by words of similar import. *Id.*

11. QUANTITY OF LAND SOLD DEFICIENT—RELIEF.—A vendor who conveys a tract of land with a general warranty as containing an estimated quantity, more or less, when his own title papers were for less than such specified quantity, is bound to make good the difference to the purchaser. But a deficiency of eight acres in a tract of five hundred and fifty-two acres, is no more than a purchaser who buys for more or less may reasonably expect. *Nelson v. Matthews*, 620.
12. INDIAN TITLE, NATURE OF.—The title of the Indians to lands is regarded by the European and American governments as a mere possessory right. *Strother v. Cathey*, 683.
13. CONTRACT TO CONVEY.—If a person agree to convey five hundred acres out of one of two tracts of land, it is erroneous to decree a conveyance of two hundred and fifty acres out of each tract. *McConnell v. Dunlap*, 723.
14. PART FAILURE OF TITLE—DAMAGES.—On a contract for a tract of land, if the vendor be able to convey but a part only, the vendee may at his election compel a conveyance of that part, and recover damages for the deficiency, or he may refuse to take such part, and recover damages for the whole. *Id.*
15. WANT OF TITLE—DAMAGES.—A vendor commits a fraud in selling a specified tract of land, knowing he has no title. In this case the damages should be the value of the land estimated at the time of the trial, it not appearing when the contract was to be performed. *Id.*

REDEMPTION.

RIGHT OF.—A creditor agreed with a debtor to levy an execution on the whole of the debtor's property, and to purchase it in at the sale, and hold it as a security for the debt; it was held equity would give a right to redeem as against the creditor, but not as against purchasers for a valuable consideration without notice of this trust. *Wilcox v. Morris*, 678.

RENT.

WHEN SUSPENDED.—Where a lease was made for a term of years reserving rent, and afterwards the lessor mortgaged the same property to the lessee in fee, and the mortgagee refused to pay the rent, the rent is suspended until the condition is performed, or the estate redeemed, and during the suspension, the lessee must account for the income as mortgagee to be applied in the discharge of the principal and interest of the debt. If rent is voluntarily paid, he cannot afterwards be accountable as mortgagee for the income of such period. *Newall v. Wright*, 98.

See LEASE, 2.

REPLEVIN.

1. PART OWNER CANNOT MAINTAIN.—An action of replevin cannot be

maintained by a part owner of a chattel for his undivided part; and when it appears from the plaintiff's own showing that he is merely a part owner, the court will abate the writ *ex officio*. *Hart v. Fitzgerald*, 75.

2. **DAMAGES.**—In an action of replevin the jury may give such damages as they think the plaintiff is justly entitled to, as an equivalent for the injury sustained. *Dorsey v. Gassaway*, 557.

RIPARIAN GRANTS.

EXTENT OF.—A proprietary grant, in 1680, of "a piece of land below high-water mark, to set a shop upon, not exceeding forty feet in width," was construed to include the land as far as low-water mark. *Adams v. Frothingham*, 151.

SALES.

1. **WARRANTY OF TITLE.**—In a sale of personal property there is an implied warranty in respect to the title of the vendor; but it is otherwise as to the quality or soundness of the thing sold. *Defreeze v. Trumper*, 329.
2. **PAROL WARRANTY.**—Where the parties to a bill of sale of a ship reduced their agreement to writing by a bill of sale, it was held that no action would lie on a parol warranty made at the time of sale, and when no fraud was alleged. *Mumford v. McPherson*, 339.
3. **TITLE OF PURCHASER.**—There being no market overt here, a purchase for a valuable consideration and without notice vests no higher title in the vendee than was possessed by the vendor, and in the case of a purchase made in a foreign country, the general principle of law applies, unless some local law be shown which would affect the property. *Wheelwright v. Depeyster*, 345.
4. **WARRANTY.**—If a seller of goods affirms them to be of a particular quality, and the buyer receives them upon the credit of such affirmation, and they afterwards appear to be of a different quality, the purchaser may return the goods and recover back the money had and received; or he may have his action without a return of the goods, if he gives notice to the seller where they are deposited. And the same rule exists where there is a warranty of soundness. *Rutter v. Blake*, 550.
5. **SUBSEQUENT TITLE OF VENDOR AVAILABLE TO VENDEE.**—A mortgage of slaves subsisted when the mortgagor, claiming full title, sold them for a full consideration; though as to the mortgagee, the sale transferred only an equitable interest; yet, as between the vendor and vendee, the sale passed the absolute title to the vendee, and therefore, when subsequently the mortgagor obtained his discharge under the insolvent law, and purchased the slaves from the mortgagee, the title thus acquired will inure to the benefit of the vendee. *Dorsey v. Gassaway*, 557.
6. **WARRANTY.**—A vendor who affirms his goods to have a certain quality which they do not possess, and when such quality would increase their value, is liable to an action, although he did not know the affirmation to be false. *Thompson v. Tate*, 678.

7. **WARRANTY IMPLIED ON SALE.**—An express warranty excludes an implied one. In the contract of sale the law implies no warranty as to the quality of the goods sold, although it may imply a warranty of title where the vendor has possession at the time of sale. *Lenier v. Auld*, 680.
8. **BY BAILEE.**—If a bailee sell property to an innocent purchaser, without notice, the sale transfers no right of property as against the bailor, and the latter may have recourse either to the bailee or his vendee. *Olson v. Woods*, 740.
9. **WARRANTY OF TITLE IMPLIED.**—In every sale of personal property by one in possession, there is an implied warranty of title by the vendor. *Id.*
10. **WARRANTY IMPLIED.**—A vendor is liable in an action on the case for unsoundness of personal property, which was known to him, and not disclosed to the buyer, where there is no express warranty, and nothing said of the soundness. *McFarlane v. Moore*, 752.
11. **WARRANTY OF TITLE.**—A warranty of title is implied on the sale of an unnegotiable chose in action, and the purchaser acquires the right, and assumes the risk of its value; where it is, in fact, void, the buyer is entitled to recover the price, although the seller was innocent of any fraud, and ignorant of the defect. Accordingly, when a land warrant was sold, and it was subsequently declared void, the purchaser may recover back the consideration paid. *Boyd v. Anderson*, 762.

See SHIPPING, 3.

SEDUCTION.

DAMAGES FOR.—No action can be maintained by an unmarried woman for seducing her, under pretense of a design to marry her, there being no allegation of a promise of marriage. *Paul v. Frasier*, 95.

SHERIFFS.

DAMAGES FOR ESCAPE.—In an action against a sheriff for an escape and false return, on mesne process, the plaintiff can recover no more than he might have done in the original action, and his actual recovery ought to be the amount of his loss, in consequence of the escape. *Potter v. Lansing*, 310.

SHIPPING.

1. **LIABILITY OF OWNER TO FREIGHTER.**—The owner of a ship carrying goods on freight upon a circuitous voyage, is bound to have her in a state of repair at every port where she may be; and he is liable to the freighter for any damage to the goods for want of such repairs, no matter whether the defect in the ship was known or unknown to the ship owner. *Putnam v. Wood*, 179.
2. **SHIPPING CONTRACT—ON WHOM LOSS FALLS.**—Upon a contract of affreightment, where the shipper assumes the perils of the sea, and the owner is to receive a share of the profits in lieu of freight, if damage be caused by the perils of the sea, the loss is to be deducted out of the profits, so as to be sustained by the owner and freighter jointly. *Id.*

3. **SALE OF VESSEL GOOD WITHOUT DELIVERY.**—The sale of a vessel and cargo, abroad at the time, by a *bona fide* bill of sale, is valid against the vendor's creditors, provided the vendee takes possession thereof, without delay, upon the return of the vessel. *Portland Bank v. Stacey*, 253.
4. **FREIGHT, WHEN EARNED.**—A vessel was chartered from New York to St. Domingo and return, the charterer to pay an entire sum for the whole voyage, in sixty days after the return of the vessel to New York. Arrived in sight of St. Domingo, the vessel was turned away by a British cruiser, because of a blockade of that point; thereupon, she returned, with her original cargo, to New York, where the owners refused to deliver the cargo until freight was paid. In an action of trover to recover the value of the goods, it was held that no freight was due. *Scott v. Libby*, 431.
5. **CHARTER PARTY, HOW DISSOLVED.**—A blockade of the port of destination dissolves the charter party, and thus all claim for freight under it must be given up. No *pro rata* freight can be recovered, unless the goods have been accepted at a place short of the port of destination. *Id.*

SLANDER.

1. **EVIDENCE IN ACTION OF.**—In an action for slander, the plaintiff may give evidence of his own rank and condition in life, to aggravate the damages; and the defendant may also avail himself of such evidence when it legally tends to mitigate the damages. *Larned v. Buffinton*, 185.
2. **SAME.**—The defendant may give in evidence, under the general issue, facts tending to mitigate the damages, but this will be refused when he has pleaded the truth in justification. *Id.*
3. **SAME.**—If, through the fault of the plaintiff, the defendant, at the time of speaking the words, and when he pleaded the justification, had cause for believing them true, he may show this in mitigation of damages. *Id.*
4. **PRIVILEGED EXPRESSIONS.**—A representative is not liable for defamation when the words charged were uttered in the execution of his official duty, and although spoken maliciously; nor if not uttered in the execution of his official duty, and not maliciously, or with intent to defame. *Coffin v. Coffin*, 189.
5. **WORDS NOT ACTIONABLE.**—To say of a person, "He has sworn falsely," or "He has taken a false oath against me in Squire Jamison's court," or "He has falsely and maliciously charged and imposed on me the crime of perjury," is not actionable. *Ward v. Clark*, 383.
6. **SAME.**—To charge a married woman with adultery is not, *per se*, actionable; and to render such charge actionable, special damages must be alleged and proved. *Buys v. Gillespie*, 404.
7. **SAME—QUESTION FOR JURY.**—If words actionable, *per se*, be spoken between members of the same church, during religious proceedings connected with the discipline of the church, and without malice, no action will lie; and the question of malice is to be determined by the jury. *Jarvis v. Hatheway*, 473.
8. **ACTIONABLE WORDS—FALSE SWEARING.**—To make the word "for-

sworn" slander, it must be introduced by a *colloquium* setting forth some judicial proceeding in which the party was sworn. Hence, in an action for slander where the words charged were that "he the said J. swore false and swore to a lie," "*innuendo* meaning that the said J. had taken a false oath before a magistrate;" it was held not to be actionable. *Sheely v. Biggs*, 552.

9. OFFICE OF AN INNUENDO.—The office of the *innuendo* is to explain doubtful words where there is matter sufficient in the declaration to maintain the action; but if the words in themselves are not actionable, their meaning cannot be extended by the *innuendo* to make them actionable. *Id.*
10. EVIDENCE IN MITIGATION.—Where the defendant pleads not guilty in slander, he may give evidence showing that he only repeated the words uttered by another, in mitigation of damages; all the circumstances of hearing the slander first published, and the manner of repeating it, ought to be considered by the jury in mitigation or aggravation of the damages. *Easterwood v. Quinn*, 700.

See LEGISLATURE, 1, 2.

SPECIFIC PERFORMANCE.

See EQUITY, 5.

STATUTES.

1. CONSTITUTIONAL RIGHT OF LEGISLATURE TO CHANGE TENURE.—A statute converting existing estates in joint-tenancy into estates in common is constitutional, because not impairing vested rights, but rendering the tenure more beneficial. *Holbrook v. Finney*, 243.
2. CONSTRUCTION.—When the legislature has used a term, without defining it, which has a well settled meaning in the common law, it must be supposed that they use it in the same sense. *Hillhouse v. Chester*, 265.
3. EFFECT OF PRIVATE STATUTE ON THIRD PARTIES.—Where by a private act of the legislature the property of a person is directed to be sold or disposed of, and the money realized to be paid to certain creditors, it must be understood as saving the rights of third persons, and can only amount to a quitclaim of the right or interest of the state. *Jackson v. Catlin*, 415.
4. CONSTRUCTION.—In the construction of a statute, the intention of the legislature should prevail, and should be collected from the whole law, and the circumstances which produced it. Accordingly, where a statute recited that A., who was living, had only female heirs, and it appeared that A. had two daughters, named B. and C., and no other children, it was held that by the words female heirs were meant the two daughters of A. *Beall v. Harwood*, 532.

See CONSTITUTIONAL LAW, 1; TAXATION, 1.

STATUTE OF FRAUDS.

1. SHERIFF'S DEED.—A sale of land by the sheriff is within the statute of frauds, and it is necessary there should be a deed or note in writing,

- specifying with certainty the lands sold, in order to pass the estate. *Jackson v. Catlin*, 415.
2. **CONSIDERATION MUST BE IN WRITING.**—Where a statute of frauds provided that “no person shall be charged on any promise, etc., unless the agreement on which such action shall be brought, or some note or memorandum thereof shall be in writing,” it was held that an agreement relating to the sale of lands must have the consideration for the promise, as well as the promise itself, in writing. *Sears v. Brink*, 475.
 3. **MEMORANDUM REQUIRED.**—The form of the memorandum of the agreement required by the statute of frauds is not material, but it must state the contract with reasonable certainty, so that the substance of it may be understood from the writing itself without having recourse to parol proof. An entry made by the vendor in his book of sales, of the name of the buyer and the terms of the contract of sale, which was read to the agent of the vendee making the purchase, and assented to by him, was held an insufficient memorandum within the statute of frauds, it not being signed by the party to be charged, or by his agent. *Bailey v. Ogden*, 509.
 4. **DELIVERY REQUIRED.**—An actual delivery of the goods, or a part of them, is not always required by the statute of frauds, but a virtual or constructive delivery may be sufficient. Those circumstances which ought to be held tantamount to an actual delivery, ought, however, to be so strong and unequivocal, as to leave no doubt of the intent of the parties. An agreement with the vendor about the storage of the goods, and the delivery by him of the import entry to the agent of the vendee, were held not to be sufficiently certain to amount to a constructive delivery, or to afford an *indicium* of ownership. *Id.*

STATUTE OF LIMITATIONS.

1. **PLEADING STATUTE.**—In an action upon a promissory note executed in New York by parties inhabitants of that state at the time, it was held that the statute of limitations of New York could not be pleaded in bar to the action in Massachusetts. *Pearsall v. Dwight*, 35.
2. **WHEN NOT BARRED BY.**—If any items of an account are within six years, they will also take with them such items as are beyond six years, so as to prevent the bar of the statute of limitations. *Cogswell v. Deliver*, 45.
3. **BAR TO.**—A fraudulent concealment by the defendant that a cause of action had accrued to the plaintiff, is a good replication to a plea of the statute of limitations, and is sufficient in law to avoid the plea of the statute. *First Mass. T. Corporation v. Field*, 124.
4. **OF ANOTHER STATE CANNOT BE PLEADED.**—The defendant in an action here may set off demands against the plaintiff arising when both parties resided in Connecticut, notwithstanding that such demands would be barred by the statute of limitations of that state, provided six years have not elapsed since the plaintiff came into this state. *Ruggles v. Keeler*, 482.
5. **ABSENCE FROM STATE PREVENTS STATUTE RUNNING.**—The saving in the statute of limitations extends to foreigners, or those who have never resided in the state, as well as to citizens who may be temporarily absent. *Id.*

6. **WHEN NOT SUSPENDED.**—When the statute of limitations once begins to run, its operation does not cease by the intervention of infancy, coverture, or other legal disability. *Fitzhugh v. Anderson*, 625.
7. **PROMISE TO BAR.**—To take a case out of the statute of limitations, an express acknowledgment of the debt, as a debt then due, or an express promise to pay it, must be proved to have been made within the time prescribed by the statute. *Bell v. Rowland*, 729.
8. **INSTRUCTION TO JURY.**—In such a case the court may either instruct the jury as to the law, and leave them to determine the fact, or the court may take the whole evidence on the part of the plaintiff as true, and the facts sworn to by the witnesses as sufficiently proved, and instruct the jury as to the law arising on those facts. *Id.*
See EXECUTORS, 4.

TAXATION.

1. **WHEN STATUTE DIRECTORY.**—A statute required that a school district tax should be assessed within thirty days after the clerk of the district should certify to the assessors the sum to be raised. This was held to be directory merely. *Pond v. Negus*, 131.
2. **NEW ASSESSMENT, WHEN FIRST INVALID.**—If an illegal assessment be made, the same or succeeding assessors make a new assessment, for which purpose the district clerk may issue a second certificate. *Id.*
3. **BILLIARD TABLE LIABLE TO TAX.**—A billiard table erected and used merely for the purpose of amusement is liable to the tax on "billiard tables," in the same way as if used for the purpose of gaming. *Seave v. West*, 694.

TENANCY IN COMMON.

TENANCY IN COMMON.—A conveyance of a moiety of a piece of land in "quantity and quality," creates an estate in common between the grantor and grantee. *Adams v. Frothingham*, 151.

TRESPASS.

WHO MAY MAINTAIN.—Where the owner of land agreed with another to cultivate the land on shares, they may jointly maintain an action of trespass against a third person who cuts and carries off the crop. *Foots v. Colein*, 478.

See PLEADING, 2.

TROVER.

1. **WHEN NOT MAINTAINABLE.**—An agent compromised a demand of his principal by receiving a negotiable note indorsed to the agent specially; it was held that the principal was not entitled to maintain trover for the note against the agent; but the latter became immediately answerable for the amount liquidated as for so much money received by him to the use of his principal. *Floyd v. Day*, 171.
2. **RIGHT TO MAINTAIN TRESPASS OR TROVER.**—The property of personal chattels draws to it the possession, so that the owner, although not in actual possession, may bring either trespass or trover, at his election, against a stranger who takes them away. *Bird v. Clark*, 269.

3. **JOINT OWNER.**—One joint owner of a chattel may bring trover or trespass for his separate interest, and the defendant cannot take advantage at the trial of the non-joinder of the other parties, but must plead it in abatement. *Wheelwright v. Depeyster*, 345.

TRUSTS.

1. **RESULTING TRUST.**—If A. buys land with the money of B. and takes a conveyance to himself, he will be considered a trustee for B.; and such an implied or resulting trust is not within the statute of frauds, and may be proved by parol, and the land may be sold on an execution under a judgment against B., the *cestui que trust*. *Foots v. Colvin*, 478.
2. **PAROL EVIDENCE SHOWING TRUST IN DEED.**—A person being subject to intoxication, and therefore fearing imposition, conveyed his property by an absolute deed to another, for the benefit of his child, a minor; but no declaration to this effect appeared in the deed. Parol evidence is admissible to prove the trust. *Gay v. Hunt*, 681.
3. **NOTICE OF TRUST TO PURCHASER.**—To make the purchaser of a legal title a trustee, it is not necessary that he should have notice as to the particular *cestui que trust*; it is sufficient if he has notice that the person from whom he buys is but a naked trustee; he is then bound to inquire and find out the *cestui que trust*. *Maples v. Medlin*, 687.

USURY.

See **CONTRACTS**, 16.

WARRANTY.

See **COVENANTS**, 2, 4; **DAMAGES**, 2; **INSURANCE**, 5; **SALES**, 1, 4, 6, 7, 9, 10, 11.

WILLS.

1. **EXECUTORY DEVISE.**—A devise was made in these words: "I give unto my three sons, A., B. and C., all my other lands, etc. Also, my will is that if either or any of them should die without children, the survivor or survivors to hold the interest or share of each or any of them so dying without children as aforesaid." It was held that an estate in fee-simple passed, determinable on the contingency of the children dying without issue, and on that contingency vesting in the survivor or survivors by way of executory devise. *Richardson v. Noyes*, 24.
2. **DEVISE—LIMITATION IN FEE.**—A testator, after charging his estate with the payment of a debt, providing for his wife, etc., devised his real estate to his four sons and a daughter, Elizabeth, and then added: "Further, my mind and will is, that if any of my said sons, William, Jacob, Thomas and John, or my daughter Mary, shall happen to die without heirs male of their own bodies, that then the lands shall return to the survivors to be equally divided between them." It was held that these words did not create an estate tail, but a limitation over in fee to the survivors, on the failure of the male heirs. *Fosdick v. Cornell*, 340.
3. **EXECUTORY DEVISE.**—A devise of "all his estate, real and personal, to his six children, to be equally divided between them, share and share

alike; but if any of them died before arriving at full age, or without lawful issue, then his, her or their part or share should devolve upon and be equally divided among the surviving children, and their heirs and assigns forever," was held to be good as an executory devise, and that the share of one of the sons who died without issue, after the death of four of the other children who left issue, went to the only surviving child. *Jackson v. Blanshan*, 485.

4. **REVOCATION.**—Less ceremony is required in the revocation than in the execution of a will; the former may be effected by obliteration or tearing, *animo revocandi*. *Pringle v. McPherson*, 718.
5. **OBLITERATING EXCEPTION.** — An obliteration of an exception to a general clause in a will does not restore the operation of such clause, without a republication, this being considered a new devise. *Id.*
6. **REVOCATION UNDER MISTAKE.**—If the revocation be ineffectual in law, or if a former will be canceled under the impression that a latter will is good, which proves invalid, the first will not be revoked; and if the devisee, under the latter will, is not legally entitled to take, the devisee under the first shall not be affected. *Id.*

See EVIDENCE, 7, 12, 14; HUSBAND AND WIFE, 2.

WITNESSES.

See ACTION, 1.

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